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July 31

42

**REPORTS OF CASES**  
**DETERMINED IN THE**  
**SUPREME COURT**  
**OF THE**  
**STATE OF WASHINGTON,**

**CONTAINING**  
**DECISIONS RENDERED DURING THE JANUARY AND MAY SESSIONS,**  
**1891, AND THE RULES OF THE SUPREME COURT ADOPTED**  
**NOVEMBER 2, 1891.**

---

**EUGENE G. KREIDER,**  
**REPORTER.**

---

**Volume II.**

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**1892.**

Rec. March 17, 1892

## JUDGES OF THE SUPREME COURT OF THE STATE OF WASHINGTON.

---

HON. THOMAS J. ANDERS, . . CHIEF JUSTICE.  
HON. ELMON SCOTT, . . . . JUDGE.  
HON. RALPH O. DUNBAR, . . JUDGE.  
HON. THEODORE L. STILES, . . JUDGE.  
HON. JOHN P. HOYT, . . . . JUDGE.

---

## OFFICERS AND EMPLOYES OF THE COURT.

---

MR. SOL. SMITH, . . . . . *Clerk.*  
MR. C. S. REINHART,\* . . . . . *Clerk.*  
MR. E. G. KREIDER, . . . . . *Reporter.*  
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MISS MAY L. SYLVESTER, . . . . . *Stenographer.*

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\* Succeeded Mr. SOL. SMITH (resigned), on March 4, 1891.





## ROLL OF ATTORNEYS.

ADMITTED TO PRACTICE IN THE SUPREME COURT OF WASHINGTON  
FROM DECEMBER, 1854, TO DECEMBER 31, 1891.

---

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Albertson, Robt. B.  
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Allen, Geo. A.  
Allen, John B.  
Allen, John H.  
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Allen, T. N.  
Ames, G. G.  
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Boynton, H. R.  
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Brents, Thos. H.  
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Bronaugh, E. C.  
Bronson, Ira D.  
Brown, Josiah T.\*  
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Bruce, S. M.  
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Bryan, Thos. O.  
Buck, Norman.  
Burke, Thomas.  
Burleigh, Andrew F.  
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Bush, Newton W.  
Bush, W. S.  
Byers, Ovid A.

Caldwell, Edgar G.  
Calhoun, John J.\*  
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Cann, T. H.  
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Caton, N. T.  
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Cavanaugh, W. T.  
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Clark, Frank.\*  
Clark, James E.  
Clark, Wellington M.  
Claypool, Chas. E.  
Clendenin, John S.\*  
Cleveland, A. A.  
Clise, Henry R.  
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Cole, Albert S.  
Cole, Fremont.

Collins, B.  
Corine, Ray E.  
Cosgrove, S. G.  
Cotton, W. W.  
Cox, Jr., R. S.  
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Crowley, Daniel J.  
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Curry, M. T.

Danforth, C. H.\*  
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Davis, Hiram G.  
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Donworth, Geo.  
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Dorr, Chas. W.  
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Easterday, C. M.  
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Edmiston, James E.  
Edsen, Eduard P.  
Ells, Edwin.  
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Engle, A. W.  
Evans, Elwood.  
Everette, Willis E.  
Everts, Lucian.

Fargo, S. B.  
Fauntleroy, Conrad.  
Feighan, John W.  
Fenton, W. D.

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\* Deceased.

Ferry, E. P.  
 Finch, D. O.  
 Fishback, Chas. F.  
 Fitch, Andrew P.  
 Fletcher, Jno. D.  
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 Forrest, W. T.  
 Forster, Geo. M.  
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 Franklin, Harvey R.  
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 Gibbs, George.  
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 Gordon, Merritt J.  
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 Gowan, Richard.  
 Gowey, John F.  
 Griffiths, Thomas C.  
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Hadley, H. E.  
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 Hale, J. F.  
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 Haller, G. Morris.\*  
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 Hamilton, J. T.  
 Hanford, Arthur E.  
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 Hankey, Frederick W.  
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 Houghton, H. E.

Howard, Clinton W.  
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 Hubbs, Paul K.  
 Hughes, E. C.  
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 Humphries, John E.  
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 Huntington, Bela S.  
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 Hyde, Samuel C.

Innis, Alvah H.  
 Isham, Alfred E.  
 Israel, George C.

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 Jacobs, O.  
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 Johnson, E. C.  
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 Jones, F. H.  
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Kalloch, Isaac M.\*  
 Kelleher, Daniel.  
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 King, H. S.  
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 Langhorne, W. W.  
 Lasater, James H.  
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 Ostrander, John Y.

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 Patterson, Chas. E.  
 Patterson, W. A.  
 Paxton, James Wilson.  
 Pearson, J. C.  
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 Whalley, John T.  
 White, W. H.  
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 Wickham, T. A.  
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 Williams, Kenneth.  
 Williams, R.  
 Williams, Solan T.  
 Williamson, J. A.  
 Wilson, John L.  
 Wilson, Thos. H.  
 Wingard, S. C.  
 Winstock, Melvin G.  
 Wiswall, E. A.  
 Wood, C. E. S.  
 Woods, Andrew.  
 Wright, Frederick B.  
 Wyche, J. E.

Yocum, Geo. W.\*  
 Young, Clifton D.

\* Deceased.

## ERRATA IN 1 WASH.

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Page 25 : Last line, after word "proper" insert word "parties."

Page 272 : Twenty-fifth line, read "non-expert" in place of "expert."

Page 339 : Twenty-fourth line, read "intent" in place of "interest."

Page 483 : Eighth line, read "1886" in place of "1888."

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REPORTS OF CASES  
DECIDED IN  
**THE SUPREME COURT**  
OF THE  
STATE OF WASHINGTON,  
AT THE  
JANUARY SESSION, 1891.

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[No. 71. Decided January 12, 1891.]  
CHARLES A. MOORE V. T. R. PERROTT.

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JUSTICE OF THE PEACE—JURISDICTION—TRANSFER OF CAUSE TO  
SUPERIOR COURT—SALE.

Under the constitution of the State of Washington, justices of the peace have no jurisdiction in causes in which the demand or value of the property in controversy is one hundred dollars or more.

Where the judgment of a justice of the peace rendered November 18, 1889, for an amount larger than one hundred dollars is void because of the constitutional provision (art. 4, §§ 6, 10) limiting the jurisdiction of justices to amounts less than one hundred dollars, the removal of the cause to the superior court under the form of an appeal will be treated as a compliance with art. 27, § 5, of the constitution, providing for the transfer of pending actions to the court having jurisdiction of the subject-matter.

Where defendant employs plaintiff to build him a boat for a certain price, the general property in the boat, when completed according to contract, is in the defendant, and he is liable for the contract price upon his refusal to take the boat.

*Appeal from Superior Court, Jefferson County.*

The facts are sufficiently stated in the opinion.

*John Trumbull, and F. A. Clark, for appellant.*

*Johnson & Moody*, for appellee.

When articles are ordered to be manufactured, they are treated as the property of the vendee when made and notice thereof given to the vendee with request to take them away. The manufacturer has then an immediate right of action for the price. 2 Suth. Dam., pp. 355-6; *Bement v. Smith*, 15 Wend. 493; *Walworth v. Pool*, 9 Ark. 400; *Ballantine v. Robinson*, 46 Pa. St. 179; *Goddard v. Binney*, 115 Mass. 450 (15 Am. Rep. 112); *Higgins v. Murray*, 4 Hare, 565.

On appeal carrying up the records and pleadings entire, a trial *de novo* by appearance and consent of all parties operated as a transfer of the cause as effectively and as impartially as any transfer that could have been made. *Lowe v. Stringham*, 14 Wis. 222; *Shuster v. Finan*, 19 Kan. 114; *Blackwood v. Jones*, 27 Wis. 498. A strong instance of waiver of irregularity is where on appeal from a court having no jurisdiction of the subject-matter to a court having general jurisdiction, the parties going to trial without objection are held bound by the judgment. Cooley, Const. Lim. (5th ed.), p. 505, note; *Randolph County v. Ralls*, 18 Ill. 29; *Wells v. Scott*, 4 Mich. 347; *Tower v. Lamb*, 6 Mich. 362.

The constitution, in vesting original jurisdiction in the superior courts in certain cases, does not prevent the legislature from giving concurrent jurisdiction in the same class of cases to justices of the peace. The exercise of exclusive jurisdiction cannot be maintained under a grant of original jurisdiction only. *Clepper v. State*, 4 Tex. 242; *Houston v. Moore*, 5 Wheat. 27; *Delafield v. Illinois*, 2 Hill, 164; *Abbott v. Knowlton*, 31 Me. 77.

The opinion of the court was delivered by

STILES, J.—This action was commenced before a justice of the peace on the 9th day of November, 1889. On the



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Opinion of the Court—STILES, J.

18th day of November the justice rendered judgment against the defendant for the full amount demanded, \$240. The proclamation of the president declaring the State of Washington admitted into the Union was issued November 11, 1889. From that date the provisions of the constitution were in force (Const., art. 27, § 16), and on the following Monday, November 18th, the terms of all officers began. On Monday, November 18th, therefore, when the justice of the peace rendered this judgment, his jurisdiction of the subject-matter—that is, of an action wherein the amount in controversy was \$100 or more—had ceased, and he was powerless to take any further step in the case, except to transfer it to the superior court. Const., art. 4, §§ 6, 10; art. 27, § 5. We were strongly urged, upon the hearing of this cause, to hold that justices of the peace in this state still have jurisdiction of actions at law for the recovery of money or property in the sum of \$300. But this does not seem to be founded in any substantial reason. Before the constitution became operative, there existed in the Territory of Washington, under the organic act, courts of justices of the peace, whose jurisdiction in certain civil cases was fixed at \$300. But upon the admission of the state, as was said in *Benner v. Porter*, 9 How. 235, the territorial government was displaced and abrogated, every part of it, and no jurisdiction thereafter existed within her limits except that derived from state authority. Therefore, except for those portions of the constitution which continue in force those laws of the territory which were not repugnant to the constitution, there would have been, upon the incoming of the state, no justices' courts whatever. The justices' courts were thus continued, however, and the only matter to be decided is, whether the statute which gave them partial jurisdiction of cases involving \$300 was in any manner repugnant to the constitution. The portion of that in-

strument relating to superior courts gives them original jurisdiction in all cases in which the demand, or the value of the property in controversy, amounts to \$100, and also jurisdiction in all cases whatever in which jurisdiction shall not have been by law vested exclusively in some other court. Likewise, other sections of the same article provide that part of the judicial power of the state shall be vested in justices of the peace, with power in the legislature to determine their number and prescribe their jurisdiction, provided that such jurisdiction shall not trench upon the jurisdiction of the superior or other courts of record. Now, the previously existing statute stands as the action of the legislature, and there are justices of the peace with jurisdiction prescribed; and the question is, whether, by continuing to take jurisdiction of cases where the demand or value of the property in controversy is \$100 or more, they will be "trenching" upon the jurisdiction of the superior or other courts of record. The language of the constitution is not that the superior courts shall have exclusive jurisdiction, but it gives to the superior courts universal original jurisdiction, leaving the legislature to carve out from that jurisdiction the jurisdiction of the justices of the peace, and any other inferior courts that may be created. Thus, justices of the peace may be given exclusive original jurisdiction in cases where the demand or value of property in controversy is not \$100, in cases of misdemeanor, and of other special cases and proceedings not otherwise provided for or specially enumerated as within the jurisdiction of the superior courts. It is the enumeration of the particular matters which are within the original jurisdiction of the superior courts, which we interpret to mean that those matters pertain to them exclusively. The language is not the clearest that could have been used; but, unless it is so interpreted, there can be no possible force in the restriction placed upon the legislature in its power to con-

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Opinion of the Court — STILES, J

fer jurisdiction upon justices of the peace; for, if the minor courts can have concurrent jurisdiction with the superior courts up to \$300, there is not a syllable in the constitution to prevent them from having it to any amount. This is certainly not to be conceded.

What, then, was the effect of the judgment of the justice in this case? We hold it to have been null, void, and of no effect whatever. But the justice transferred the cause to the superior court, and we hold that the transfer thus made was sufficient, although accomplished under the form of an appeal. The cause was then tried in the superior court before a jury, upon the issues made before the justice. Appellant complains of the refusal of the court below to grant a nonsuit, on the ground that there was a variance between the allegations of the complaint and the proofs offered. But considering that the action was commenced in a justice court, and giving such a reasonably liberal construction of the pleadings as is allowable, and considering our statute upon the subject of variance, we are constrained to support the judgment. The contract was to build a boat for the defendant, and it was the boat that was to be paid for in the sum of \$240. When completed, the general property in the boat was in the defendant (*Goddard v. Binney*, 115 Mass. 450; 15 Am. Rep. 112), and the contract price was due from him. The testimony showed the completion of the boat, and a tender of it to him. He seemed pleased with it, and took possession of it far enough to use it on the water, but then refused to take or pay for it without giving any reason. There was no question here that the boat was to be built to the satisfaction of the defendant, and the evidence clearly showed the boat to be a good one, built according to the contract. The judgment is affirmed, with costs to the appellee.

ANDERS, C. J., and DUNBAR, HOYT, and SCOTT, JJ.,  
concur.

[No. 115. Decided January 15, 1891.]

F. W. PETTYGROVE JR., W. H. NATHANSON AND JAMES  
MCINTYRE JR. v. DORETTE ROTHSCHILD.

LEASE—FORFEITURE—PLEADING—APPEAL—ADMISSIONS IN BRIEF.

In an action for the forfeiture of a lease for breach of a covenant against making alterations without the consent of the lessor, it is error to strike from the answer allegations that the plaintiff had full knowledge of the making of the alterations at the time when made, that she continued to receive rent accruing thereafter, and did not object to the alterations until some time subsequently.

Such error is not cured by the fact that some evidence in support of the allegations stricken from the answer was incidentally introduced, and that the court made a finding of facts thereon, when the record does not show that the order to strike was ever vacated, nor that the matter was fully gone into.

Where the record shows the motion to strike out certain allegations of an answer, but fails to show the order of the court thereon, or that any exception was taken thereto, appellant's admission in his brief and upon the argument in this court that the motion was granted, must be taken as true, coupled, however, with the statement that the order was excepted to.

*Appeal from Superior Court, Jefferson County.*

The facts are sufficiently stated in the opinion.

*Thomas Fitzgerald, Johnson & Moody, and J. C. Haines,*  
for appellants.

A forfeiture under the terms of a lease is waived by the acceptance of rent accruing subsequent to the breach by the lessor with a full knowledge of the breach. Taylor, Landl. and Ten. (2d ed.) §§ 287, 479; *Gomber v. Hackett*, 6 Wis. 324 (70 Am. Dec. 467); *Jolly v. Single*, 16 Wis. 289; *Jackson v. Brownson*, 7 Johns. 227 (5 Am. Dec. 258); *Camp v. Pulver*, 5 Barb. 91; 1 Wash. Real Prop. (4th ed.) pp. 483, 484, subd. 14.

*John Trumbull*, for appellee.

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Opinion of the Court—SCOTT, J.

The opinion of the court was delivered by

SCOTT, J.—This was an action of forcible entry and detainer brought by appellee against appellant upon the ground of forfeiture of a lease by making alterations in the building, which was contrary to the terms of the lease unless consented to by the appellee, and which alterations she alleged to have been waste. The superior court found in her favor. Appellant, as a part of his answer, alleged that the plaintiff had full knowledge of the making of said alterations at the time the same were made, and that she continued to receive rent accruing thereafter under the lease without notifying him until some time subsequently that she intended to claim a forfeiture, and that she had thereby waived any right to take advantage thereof. The record shows that the plaintiff moved to strike the foregoing from the answer, but it fails to show any order of the court thereon. Both parties were apparently under the impression that such an order did appear, as the case was argued and submitted to us upon that theory. But the appellee contended no exception was taken thereto; that, in order to do this, it was necessary to settle a bill of exceptions. Under our practice, however, if an exception was taken and made a part of the order, a transcript of the journal entry granting the motion and showing the exception would have been sufficient to raise the question, or it would be sufficient if the statement of facts showed the exception; but, as neither the order nor exception is shown in any way by the record, the case is left in a peculiar attitude. If the motion was in fact not granted, judgment should have been rendered for the defendant upon the ground that these matters set up in the answer, which amounted to a defense if true, were not denied in the plaintiff's reply, and therefore stood admitted. If stricken out and not excepted to, the appellant would thereby be

prevented from raising the point here. We think appellant's admission in his brief and upon the argument, that the motion was granted and an order made striking said matters from the answer, must be taken as true, but that we should take it coupled with the statement there made that the order was excepted to, and the point is accordingly raised in this way. Such a course would be less injurious to the appellee; as, were the case reversed upon the ground that judgment should have been rendered for the defendant upon the pleadings—and this point is substantially raised by the record—the plaintiff might be precluded from having a retrial.

It was contended by appellee that if it was error to grant the motion the same was substantially cured by allowing appellant to introduce evidence in support of the allegations stricken from the answer. The record shows that some such proof was introduced, and the court made a finding of fact thereon against the appellant; but the record does not show that these matters were fully gone into, or that appellant was informed that he could offer his evidence in support thereof, nor that the order granting the motion, if made, was ever vacated. The mere fact that some such proof was incidentally made, and that the court found thereon, cannot be held to have cured the error under the circumstances. The judgment is reversed, and the cause remanded for further proceedings.

ANDERS, C. J., and STILES, DUNBAR, and HOYT, JJ.,  
concur.

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Jan. 1891.] Opinion of the Court—STILES, J.

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[No. 129. Decided January 16, 1891.]

THE STATE OF WASHINGTON, *on the Relation of the Nooksack River Boom Company*, v. SUPERIOR COURT OF WHATCOM COUNTY AND J. R. WINN, *Judge of said Court.*

PROHIBITION—MANDAMUS—SUPERSEDEAS—APPEAL.

The supreme court will not grant a writ of prohibition to restrain the superior court from further proceedings in an application for *mandamus*, where the superior court has already exercised jurisdiction and issued the writ of mandate, and no proper application was made at the hearing before the superior court to test its jurisdiction.

On an appeal from a judgment directing the issuance of a writ of mandate, it is error for the superior court to deny defendant's motion for a *supersedeas* of the writ pending the appeal, and to fix the amount of his bond therefor.

*Original Application for Prohibition.*

The facts are fully stated in the opinion.

*Black, Harris & Leaming*, for plaintiff.

*Thompson, Holcomb & Newman*, and *Evans, Sherman & Howard*, for defendant.

The opinion of the court were delivered by

STILES, J.—On the 3d day of November, 1890, the relator, the Nooksack River Boom Company, and the Bellingham Bay Boom Company, were rival corporations, organized under the act of March 17, 1890, entitled "An act to declare and regulate the powers, rights and duties of corporations organized to build booms and to catch logs and timber products therein." Laws 1889–90, p. 470. Both companies had their booms and works at the mouth of the Nooksack river, in Whatcom county; but the Nooksack company's boom was so much higher up, or further within the mouth of the river, that logs floating down the

2 9  
4 86  
25\*1007  
29\* 766

2 9  
8 139  
25\*1007  
35\* 600

2 9  
13 520

2 9  
28 502

2 9  
37 260

river would reach its boom first; and, its boom being thus located, it had caught large quantities of logs floating down the river, some of which were the property of persons who had made arrangements with the Bellingham Bay company to raft and boom their logs; or, as it is termed in the papers here and in the act, "consigned" their logs to that company. The Bellingham Bay company claimed and demanded that all such consigned logs be passed by the Nooksack company free of charge, and be allowed to float on unhindered into the works of the former; but the Nooksack company denied this claim, and refused this demand, unless paid the sum of seventy-five cents per 1,000 feet, board measure, of the logs so detained, as permitted by the act in certain cases. Upon this the Bellingham Bay company, deeming itself aggrieved at the action and demand of the Nooksack company, sought redress by applying to the superior court of Whatcom county for a writ of *mandamus*, requiring the latter company to follow its construction of the law and let the logs go free, both as to those detained and as to all others which should thereafter be floated down the Nooksack river under consignment to its care. The method of presenting this application for a *mandamus* was as follows: On the 3d day of November the attorneys of the Bellingham Bay company delivered to Messrs. Harris, Black & Leaming, who were attorneys resident at Whatcom, and who, it appears, had theretofore been the usual attorneys of the Nooksack company, a notice in writing, purporting to be a notice in a cause in the superior court, and having as a caption the title of the court, and "Bellingham Bay Boom Company, plaintiff, v. Nooksack River Boom Company, defendant." It was addressed "to said defendant," and proceeded to give notice that at 2 o'clock P. M. on November 6, 1890, the plaintiff would apply to the superior court of Whatcom county for the issuance of a peremptory writ of *mandamus*, commanding the



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Opinion of the Court — STILES, J

defendant to pass the logs in question, etc. Reference was made in the notice to a "copy of motion and affidavits herewith served," and it was stated at the close of the notice that, "if you desire, you may appear at said time and resist the issuance of said writ." It was signed by the attorney of the plaintiff. The "motion" was a document bearing a caption exactly like that on the notice, and was substantially in the form of a complaint in a civil action, and prayed a peremptory writ of *mandamus*, commanding the defendant to remove the obstructions it had placed in the way of the passage through its boom of all logs consigned to the plaintiff, and to at once pass and permit to be passed, free of charge, all logs so consigned to it, and bearing certain proprietary marks, and any and all logs which in the future should be consigned to the plaintiff's boom. The motion was verified in the manner in which complaints are required to be verified, and to it were attached sundry affidavits of third persons, whose logs were among those alleged to be detained, who described their property, and stated various facts going to show a detention by the defendant. Harris, Black & Leaming indorsed upon a copy of the notice delivered to them: "Service of above notice accepted, and copies received, this 3d day of November, 1890," and signed themselves "Attys. for Deft."

The motion and supporting affidavits were filed in the superior court on the 6th day of November, but, probably through an oversight, the notice, with its acceptance of service, was not filed until November 8th. At the hour noticed, 2 o'clock, November 6th, the business before the superior court, with a jury in attendance, was suspended, in order that the plaintiff might make his application for a *mandamus*. One member of the firm of Harris, Black & Leaming, at least, was present in the court to represent the defendant; and, both sides having been asked if they were ready to proceed, answered in the affirmative. The defend-

ant's attorney thereupon orally objected to the court's taking any action upon the application, claiming that the procedure by motion was unauthorized; that it should have been commenced by the filing of a complaint and the issuance of a summons; that, not having been so commenced, the court had no jurisdiction of the person of the defendant; that there had been no service upon the defendant, but merely a notice to certain attorneys supposed to represent it; and that, finally, if the proper practice in *mandamus* was by motion, there must first be an alternative writ, which should be served upon the defendant, to which a return could be made at a time to be fixed in the writ. The court declined to recognize the objections thus made unless the defendant's attorney would appear in the proceeding by some plea in writing, and urged him to file such papers as he deemed material; but this the attorney refused, and requested the court first to rule whether the plaintiff had any standing upon the proceeding by motion, to which the court again declined to accede. Defendant's attorney then contented himself with his position, and plaintiff's attorneys demanded the relief asked be allowed as matter of course. The court took the matter under advisement until the next day, and on the morning of November 7th, at the opening of the court, announced an oral decision in favor of the plaintiff, and granted the peremptory writ; whereupon the defendant's attorney, without waiting for the formal entry of the judgment, or the issuance of the writ, or making any motion or appearance gave notice of an appeal from the judgment to this court, which notice was entered upon the minutes of the court by the clerk. Shortly after giving notice of appeal, on the same day, and without the knowledge or leave of the court, defendant's attorney filed with the clerk a purported answer to the motion for the writ, supported by a number of affidavits. On the afternoon of the same day, the plaintiff's

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iff's attorneys submitted to the court proposed forms of a judgment and writ, in accordance with the oral decision, which, after inspection by defendant's attorney, on November 8th, the court ordered to be entered and issued as of November 7th. The writ was served upon the defendant on the 8th day of November, by the sheriff of Whatcom county; and on the same day the defendant filed a motion to stay the writ pending its appeal, and to fix the amount of a bond therefor, which motion, after argument, the court denied, November 10th. On the 12th of November the defendant also filed a motion in the superior court to vacate its judgment and recall its writ, but this motion was not heard or otherwise disposed of. This completes the material part of the history of the case in the superior court. On the 12th day of November the relator, the defendant below, applied to this court for a *supersedeas* to stay any further action in the case in the superior court until the cause could be heard on the appeal, and for a writ of prohibition to restrain that court from any further proceedings whatever, other than the signing of a bill of exceptions. This application was granted to the extent of an order to show cause why such relief should not be given, with a temporary restraining order until the matter could be heard; and from the return of Hon. J. R. Winn, judge of the superior court of Whatcom county, to the order to show cause, we gather the facts as above stated, with the exception of those preceding the appearance of the parties in that court.

Upon this state of facts the question is, what should be done, having due regard to the accomplishment of justice, and the preservation of a dignified and orderly course of procedure in the courts of the state? This court undoubtedly has the power to issue writs of prohibition to the superior courts of the state in proper cases, but in so doing it must be guided by the rules of law applicable to such

extraordinary proceedings, and must not in any case overstep the bounds of necessity in any spirit of zeal for the redress of what it deems an injustice. To justify the issuance of a writ of prohibition from a superior to an inferior court, it must clearly appear—*first*, that the inferior court is about to take jurisdiction of a matter of which by law it has no jurisdiction; *secondly*, that there is still something which the inferior court is about to do under its claim of jurisdiction; *thirdly*, that an application has been made to the inferior court for a decision that it has not jurisdiction of the subject-matter involved, which has been refused; and *fourthly*, that there is no other proper remedy. Measuring by these requisities, we should not be warranted in granting the writ of prohibition at this time. Before the application was made to this court the jurisdiction had been taken and exercised by the superior court, and its judgment had been entered, and its writ issued and served; therefore, nothing remained for it to do in the case. True, upon a refusal of the defendant to obey the writ, the court could attach its officers, and punish them by fine and imprisonment; but it might never have done so, and it was not threatening to do so on the 12th day of November. No proper application was made to that court to test the question of its jurisdiction over the subject-matter, if indeed that subject was mentioned at all in the discussion at the hearing. The practice in *mandamus*, and the question whether there was jurisdiction of the person of the defendant, were discussed informally, without plea or motion; but for all it amounted to, the attorney for the defendant might as well have remained mute, or absented himself entirely. The writ was allowed substantially *ex parte*, the defendant merely standing by as a spectator. Subsequently an answer was filed, and the court was asked to rehear the matter, and a motion was made to vacate the judgment and recall the writ; but these attempts came after the notice of appeal,

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which operated as a general appearance of the defendant, and cut off all further proceedings in the superior court excepting those necessary to the perfection of the appeal. Had the relator, without giving its notice of appeal and thus submitting its person to the jurisdiction, at once applied to this court for a writ of prohibition on the ground that the superior court had no jurisdiction of the subject-matter of the proceedings, viz., of a proceeding in *mandamus* to enforce the asserted rights of the plaintiff, the result of its application might have been entirely different; but we do not pass upon that matter, for the reason that it seems to be necessarily involved in the case coming before us on appeal. It remains to be considered whether there is any other relief in the premises to which the relator is entitled.

It is shown by the record that on the 8th day of November the relator applied to the superior court, by motion, to have the amount of its bond on appeal fixed, and for a stay of proceedings under the judgment and writ of *mandamus* pending the appeal, which motion the court denied on the 10th of November, on the ground that the filing of a bond would not act as a *supersedeas* or stay of execution of the writ of *mandamus*. And herein, as we view the matter, lies the true cause of complaint of the relator. The writ of *mandamus* being originally, in its English origin, a writ of the highest prerogative character, was, for that reason, excepted from the category of judicial decrees which were suspended by an appeal to a higher court. But in the United States, with but few, if any, exceptions, the idea of prerogative has been abandoned, and the writ has come to be regarded much in the nature of an ordinary action between the parties, to be issued or not, according as the party aggrieved may or may not show himself entitled to that peculiar species of relief; or, in other words, an action for the enforcement of a right in cases where the law affords no other adequate means of

redress. And a judgment in a *mandamus* proceeding, as in case of an ordinary action at law, is subject to review by writ of error or appeal upon like conditions as in other cases. See High, Ext. Rem. § 4, and notes of cases. Now, this modern and American theory of *mandamus* would seem to place this remedy, and the judgment and writ consequent upon it, precisely on a level with ordinary judgments and orders of courts in other cases; and it is a well settled rule that while a *supersedeas* bond does not stay any part of a judgment which commands the party against whom it runs to refrain from doing any act covered by the judgment, yet, where the judgment requires a party to perform some affirmative act, an appeal stays the immediate necessity for the performance, and prevents the court which rendered the judgment from punishing as a contempt the failure to perform, until the conclusion of the case on appeal. But if there be any doubt as to the general rules thus rehearsed, and their application to the proceeding in *mandamus*, we hold it to be clearly resolved in this state by § 701 of the code, which declares that not only may appeals or writs of error be taken from judgments directing writs of mandate, but that they may be taken “in like manner and [with like] effect as in civil actions.” Therefore, inasmuch as the peremptory writ in this case, in so far as it had any legal effect, commanded the relator to do an act which it seeks by its appeal to relieve itself from doing, and the doing or not doing of which is the kernel of the whole controversy, it is proper that, under sufficient security that it will obey the judgment and writ if the final determination of the cause on appeal be against it, it should have had the amount of such a security fixed, and upon the filing of its bond all proceedings looking to the enforcement of the writ should have been stayed. In refusing this right the superior court erred, and the correction of its error is, we conclude,

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the proper remedy to apply. This conclusion, when carried out, will be substantially a *mandamus* to the superior court of Whatcom county requiring it to fix the bond as prayed for in the defendant's motion of November 8th, the effect of which bond, when filed, will be to stay any further proceedings looking towards the enforcement of the writ. Let an order to that effect issue; costs to the relator.

ANDERS, C. J., and DUNBAR, J., concur.

HOYT and SCOTT, JJ., concur in the result.

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[No. 88. Decided January 23, 1891.]

J. H. MCGRAW v. CARRIE FRANKLIN.

STATUTE OF FRAUDS—REPLEVIN—FRAUD—EVIDENCE—VERDICT.

A promise to pay the note of another at maturity need not be in writing where the promise is made directly to the maker of the note and in consideration of its execution.

Goods recently sold to plaintiff were attached by a creditor of her vendor, and in consideration of plaintiff's giving her note and a mortgage on the goods for the debt, the vendor promised to pay the note at its maturity. The note and mortgage were assigned by the payee to the vendor's brother, who foreclosed the mortgage. In replevin against the sheriff in possession of the goods under the foreclosure proceedings, plaintiff alleged that the vendor in fact paid the note, but instead of discharging the mortgage he fraudulently procured its transfer to his brother. It was shown that the brother had no money with which to buy the note, and it was conflicting as to whether the money with which the note was purchased was furnished him by the vendor or another person. *Held*, That a judgment for plaintiff would not be disturbed.

Where, in the cross-examination of a witness, the defendant brings out the fact that the brother had stated he was to get money from an old school-mate, it is not error for the plaintiff to show, on the failure of the brother to testify at the second trial of the cause without any excuse shown therefor, that on a former trial the brother had stated he received money with which to purchase the note and mortgage from a certain person who was understood by the parties

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at the trial to be the old school-mate referred to, and then introduce the latter's deposition to contradict him.

In an action against a sheriff for conversion of goods, where plaintiff testified that she gave \$785 for certain goods, depending largely on the vendor's word as to their value, and another witness testified that the goods were worth about \$800, while the defendant testified that he obtained \$378.40, the best price possible for the goods at sheriff's sale, a verdict for \$975, including interest from time of conversion, will not be set aside as excessive.

Where it appears that the verdict in an action of replevin was for damages only, it is sufficient without being in the alternative for a return of the property or for the value thereof in case a delivery cannot be had, when the point was not raised in the court below.

(ANDERS, C. J., and HOYT, J., dissent.)

*Appeal from Superior Court, King County.*

The facts are fully stated in the opinion.

*Preston, Carr & Preston, and W. S. Bush, for appellant.*

*Richard Osborn, for appellee.*

The opinion of the court was delivered by

SCOTT, J.—This was an action to recover possession of a certain stock of merchandise, or its value, brought by appellee against appellant in March, 1885. Appellee alleged in her amended complaint that she was the owner of the goods, and in the possession thereof; gave a detailed list of them with the value of each item, and stated the aggregate value to have been \$800; averred a wrongful taking by appellant, and claimed damages in the sum of \$800 for the detention. The complaint also contained a separate cause of action asking for damages occasioned by the suspension of her business. No proof was introduced in support of this, however, and it appears to have been abandoned upon the trial of the cause. The defendant denied that plaintiff owned the goods, and denied that they were of any greater value than a sum set opposite each



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item, amounting, in the aggregate, to \$378.40, and denied that plaintiff was damaged. A further defense was set up in the answer that the plaintiff gave a chattel mortgage upon said goods in August, 1884, to E. P. Ferry to secure the payment of a note for \$526, executed to him by plaintiff at said time, which became due November 10th, following; that plaintiff failed to pay the note, and on March 12, 1885, said Ferry sold the note and assigned the mortgage to one Andrew Merchant, who instituted a statutory foreclosure thereof by notice and sale in the name of the assignor; that the defendant was the sheriff of King county, and took possession of the goods and held them by virtue of said proceedings. Plaintiff, in her reply, admitted giving the note and mortgage, but alleged that the same were given for the benefit of one Robert Merchant and one W. A. Stewart, who were partners doing business under the firm name of R. Merchant & Co., as an accommodation to them, for which the plaintiff received no consideration. That said merchant also agreed to pay the note before its maturity, and did pay the same in March, 1885, before the institution of said foreclosure proceedings; but that, for the purpose of defrauding the plaintiff, the said Robert Merchant, W. A. Stewart and Andrew Merchant conspired together, and, instead of causing the mortgage to be discharged, procured it and the note to be assigned to said Andrew Merchant, of which fraud the defendant had due notice. The parties proceeded to a trial of the issues as thus formed, without objection. Plaintiff recovered a verdict for \$968.75, which, however, upon a motion therefor by defendant, was set aside. At a subsequent trial in April last plaintiff obtained a verdict and judgment for \$975, from which this appeal was taken.

Appellant contends that the court erred in permitting proof that Robert Merchant agreed to pay the note and mortgage given by plaintiff to Ferry, on the ground that

it was a promise to pay the debt of another, and not being in writing was void; that the verdict is not sustained by the evidence, in this, that the amount of the verdict is largely in excess of any proof of the value of the goods; that there was no proof of the payment of plaintiff's note by Robert Merchant, or of any fraud; and that the court erred in permitting evidence as to a statement made by Andrew Merchant, and allowing the same to be contradicted by the deposition of the witness Fenton. He also alleges the verdict to be erroneous because it is not in the alternative form. Some minor grounds of error were alleged, which were either not saved by the record or are not considered of sufficient importance by the court to discuss.

In order to review the grounds stated it will be necessary to go into the evidence to some extent. The proof shows that in the summer of 1884 Robert Merchant and W. A. Stewart were engaged in a confectionary business as partners, under the firm name of R. Merchant & Co.; that during said summer they borrowed of the plaintiff \$775, and gave her a chattel mortgage upon the goods in question to secure the payment thereof; that they subsequently conveyed the goods to her in payment of said note; that soon thereafter a suit in attachment was brought against said R. Merchant & Co. by other parties, and the goods so conveyed by them were attached in said action. Against the objection of appellant, testimony was introduced by plaintiff to the effect that Robert Merchant made her a parol promise that if she would settle the claim for which R. Merchant & Co. had been sued by giving her note for the amount to said Ferry, with a chattel mortgage upon said goods to secure its payment, he would pay the note at or before its maturity; and that she gave the note and mortgage and settled said suit accordingly. That she supposed the property was attached because they thought she

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had no right to it. It is the opinion of the court that it is not necessary such a promise should be in writing, it having been made to the plaintiff direct; that the promise was valid and binding as between the plaintiff and said Merchant.

As to the proof of value, plaintiff testified that she furnished the list of items and the amount thereof contained in the complaint; that she paid \$775 for the goods; that they were not worth any more than that, and that the list set forth in the complaint was a correct list of the property with the value of each article; that she paid \$10 additional for the counter. Upon cross-examination she admitted that she had no knowledge of the value of some of the articles, and that her knowledge as to the value of any of them was very slight; that she took Robert Merchant's word largely as to the values at the time she bought the goods, and had to do so, the way she was situated, as it was the only way she had to get pay for the amount she had loaned thereon. David Franklin, plaintiff's husband, testified that he knew the property, and made out a list of it, which Mr. Osborn wrote; that he (witness) furnished the list and amounts; that he put the property in at a fair estimation; that the total valuation was in the neighborhood of \$800; and that the property was worth about that amount. Upon cross-examination he testified that they had never been in the candy business before, and that he had never bought or sold any candy machinery. The only other proof in relation to value was introduced by defendant, who testified that he obtained the best prices possible for the goods at a sheriff's sale, and that they brought \$378.40. If the plaintiff was entitled to recover the value of the goods she could also recover interest thereon from the time of the conversion, there having been no proof of any special damage; and the evidence as to value was sufficient to sustain the verdict found.

The point raised as to the failure of the proof to show any fraud, or payment of plaintiff's note by Robert Merchant, and as to the proof of the statement made by Andrew Merchant, will be considered together. The plaintiff testified Robert Merchant told her, if she would give her note and mortgage to Ferry to pay the claim for which R. Merchant & Co. had been sued, that he would go over in Oregon and raise the money, pay off the mortgage, and take the business back; that he owned land in Oregon; that he thereafter went to Oregon, and said he would borrow the money of his mother; that Andrew Merchant was poor, and was working around by day's work; that he did not have any money to pay board or room rent, and did not have any money with which he could buy plaintiff's note and mortgage; that he lived with his family in the back end of her store-room; and that after the sale of the property by the sheriff, Robert Merchant took it and went on with the business as before, under the firm name of R. Merchant & Co.

David Franklin testified that when the property was attached in the suit against R. Merchant & Co., he said to Robert Merchant: "'How is this? You claimed, when you got that money and gave the bill of sale, that there were no debts against the place. What are you going to do about it?' And that Robert Merchant said: 'We will make that all right.' I said: 'We got this property in good faith, knowing nothing of any indebtedness;' and he said, 'I told you there was nothing against the place, and, if you will settle, I will go over to Oregon. I have some property there, and can get the money, and pay it before it is due, if you will settle in that way.'" That Andrew Merchant told him he was not making money enough to keep himself and pay for his children's board during the winter of 1884 and 1885; that he was hard up and had no money, and that Robert Merchant furnished him some

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money for his support; that prior to the taking of the property under the foreclosure proceedings, Andrew Merchant brought suit against R. Merchant & Co. upon a claim originally due to a firm in Chicago from R. Merchant & Co., which he claimed to have paid for them; and that the defendant also attached said property in said suit; and after its sale under the foreclosure proceedings, Robert Merchant took it and went into business again under the firm name of R. Merchant & Co.; that Robert Merchant did most of the buying at the sale. Witness knew that, because he stood by and heard Robert Merchant tell Andrew Merchant what to bid for the property; that Robert and Andrew Merchant were there together most of the time; and that Andrew Merchant, after the sale, went off to carpenter's work again.

Upon cross-examination some of the questions asked by appellant's counsel, and answers made thereto by the witness, were substantially as follows:

"Q. Explain to the jury in what way you obtained your knowledge which enables you to swear positively that Robert Merchant bought this mortgage of Ferry. A. My knowledge came right from the court, from Oregon, where he mortgaged his farm for \$1,300, and came right over here with that money.

"Q. Does that show you that Robert Merchant bought this mortgage? A. It showed me that he gave it to his brother, Andrew Merchant.

"Q. How do you know that he gave it to his brother? A. Because his brother had no money.

"Q. How do you know that? A. He told me so.

"Q. Did not he tell you that he was going to get money from an old school-mate? A. Yes, sir."

Witness admitted that he drew his conclusions, largely, from these matters.

J. H. McGraw, the defendant, testified that the property was demanded of him by the plaintiff before the sale, and that the plaintiff told him the mortgage had as matter of

fact been paid, and that the attempt to foreclose it was a fraud between Robert and Andrew Merchant; that he levied the attachment in favor of Andrew Merchant against R. Merchant upon the property, but did not remember whether he first seized it under that writ or under the foreclosure notice; but that he sold it under the foreclosure proceedings, and that the proceeds were not sufficient to pay the note.

Charles Brown testified that Robert Merchant told him he went to Oregon, mortgaged his farm for \$1,300, and sent the money to his brother, Andrew, to buy the business up for him, as he could not buy it very well himself.

David Franklin was recalled, and the following questions by plaintiff's counsel were asked, objections made thereto by defendant's counsel, and questions answered by the witness:

"Q. Did you hear Andrew Merchant testify upon a former trial of this cause? A. Yes, sir.

"Q. What did he swear then as to where he got this money?"

Defendant's counsel objected to any testimony by witness detailing any testimony given at the former trial. Plaintiff's counsel said they got out of this witness on cross-examination that Andrew Merchant said that he was going to get some money from an old school-mate; to which defendant's counsel replied: "Mr. Franklin stated that in answer to one of your questions; I questioned him further about it on cross-examination." (This is not sustained by the record. It does not appear that such a question was asked by plaintiff or such previous testimony given by the witness.) Plaintiff's counsel then said he wished to prove Andrew Merchant stated that he got \$600 from Mr. Fenton. The objection was overruled, and exception taken.

"A. He swore that he got the money from W. D. Fenton, of Oregon; that he sent him that much money that he bought the mortgage with."

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The deposition of W. D. Fenton was then offered in evidence by plaintiff, the same having been taken at McMinnville, Oregon, March 6, 1888. The defendant objected to it as being incompetent, irrelevant and immaterial. The objections were overruled, exception taken and the deposition admitted, wherein the witness testified that he had never sent Andrew Merchant any money. Appellant now objects to the deposition upon the ground that it was taken under an illegal notice, but as the record fails to show that any objection was made to the notice in the court below, it will not be considered here; and the objections that were made are not tenable. Robert and Andrew Merchant were not either of them called to testify upon this last trial. From the testimony hereinbefore mentioned we think there is sufficient evidence of fraud upon the part of Robert and Andrew Merchant, and of the payment, in effect at least, of plaintiff's note and mortgage by Robert Merchant, to sustain the verdict upon that ground. No question was raised as to the trial of these matters in an action at law. As to the proof of the statements of Andrew Merchant, the old school-mate, of whom he said he expected to get money, seems to have been understood by the parties at the trial as being Mr. Fenton, of whom he subsequently said he did get it. This inference is strengthened somewhat by Fenton's testimony that he had known Andrew Merchant for fifteen years. It is reasonably apparent from the proceedings that the two statements related to the same thing, first contemplated, and subsequently claimed to have taken place. In this view, there certainly was no error appellant could take advantage of, for in his cross-examination of Mr. Franklin he sought to and did prove the prior statement relating to the ability of said Andrew Merchant to obtain money. This testimony was clearly inadmissible, as such a statement of an interested party in his own favor could not be proven, had it been objected to on that ground.

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Having drawn out the testimony, appellant could not complain if the plaintiff was allowed to rebut it by showing that said Merchant failed to get the money of the person of whom he said he could get it. But we think the proof was also admissible as tending to prove the fraud which plaintiff claimed said Merchants were seeking to perpetrate. Appellant made no offer to have Andrew Merchant sworn as a witness upon the second trial, nor was it claimed that he was absent, or that his testimony was not obtainable. The fact that he testified, as he did at the first trial upon a material point, which was contradicted by the deposition of Mr. Fenton, taken before the second trial, with his failure to testify at the second trial without any excuse or reason having been shown therefor, were circumstances entitled to some weight, and were properly admitted in evidence.

As to the last ground of error alleged, the form of the verdict is as follows: "We, the jury in the case wherein Carrie Franklin is plaintiff, and John H. McGraw is defendant, do find for the plaintiff, and assess her damage at nine hundred and seventy-five dollars. — THOS. W. PROSCH, *Foreman*." In his nineteenth instruction to the jury, the court said: "I have prepared a blank verdict which you may substantially follow:

"We, the jury in the case wherein Carrie Franklin is plaintiff, and J. H. McGraw is defendant, do find for the \_\_\_\_\_, and assess her damages at \_\_\_\_\_ dollars.

"\_\_\_\_\_,  
"*Foreman*."

And in his twentieth instruction the court said: "If your finding is in favor of the plaintiff, you will insert in the first blank the word 'plaintiff,' and assess her damage at \_\_\_\_\_ dollars, and insert in the second blank the amount which you find in her favor. The blank over the word 'foreman' should be filled by the signature of your fore-



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man. If you find a verdict in favor of the defendant, in the first blank you will insert the word 'defendant,' and erase the words 'and assess her damage at ———;' draw a line through them, and your foreman can sign it." The defendant excepted to the form of the verdict "for the reason that it requires the jury, in case that they find for the defendant, to erase a part of the form given. The form given tends to give the idea that the court meant to say that the verdict should be for the plaintiff." It is now objected to because it was not in the alternative for a return of the property, or for the value thereof in case a delivery could not be had. The proof showed that, while the property had been largely sold to Andrew Merchant, some of it had been sold to other parties; that Robert Merchant took what Andrew Merchant bought, and went into the business again; and it is fair to infer that the property itself could not have been returned, and that it was so contemplated at the trial. But, in any event, counsel should not be allowed here to urge this as error without having raised the point in the court below. No proof was offered as to any damages for the detention of the goods, nor was the jury instructed to find upon this point. It is apparent the verdict was for the value of the property, and it was sufficient in form against the objection there made. The judgment is affirmed.

STILES and DUNBAR, JJ., concur.

ANDERS, C. J. (*dissenting*). — I am unable to concur in the conclusion reached by the majority of my brothers in this case. The plaintiff in the court below, being the owner of certain personal property, which she had previously mortgaged, sought to recover the possession, or the value thereof, from the defendant, who was sheriff of King county, and who had taken said property into custody by virtue of a statutory foreclosure proceeding instituted by the assignee

of the mortgagee. The note secured by the mortgage was overdue, and both it and the mortgage were in the possession of Andrew Merchant, to whom they had been transferred by the original mortgagee for value. No steps were taken in the pending proceedings, in accordance with the provisions of the statute or otherwise, to contest the right to foreclosure or the amount due; but instead of this, action was brought to recover the property then in the custody of the sheriff and of the law by reason of the default of the plaintiff herself. It is true the testimony of the defendant shows that, before the sale of the goods under the foreclosure proceedings, he was told by the plaintiff's attorney that, as matter of fact, the note had been paid, and that the attempt to foreclose was a fraud between Robert and Andrew Merchant. But, under the circumstances, he was not bound to relinquish the property on a mere statement of that character, nor, indeed, would he have been justified, as an officer charged with the performance of an official duty, in so doing. It is disclosed by the record that the foreclosure and sale were substantially in conformity to the statute, and the sheriff should not be held responsible in the action for the goods sold by him, unless it be shown that his acts were wrongful and unauthorized by law. The action was tried and judgment rendered against the defendant in the lower court, on the theory that the note and mortgage of Mrs. Franklin had been paid, and that, therefore, the defendant had become a trespasser by seizing and disposing of the goods in question. But I am strongly of the opinion that all the testimony upon that point, taken together, fails to show more than that Robert Merchant promised Mrs. Franklin to pay her note before maturity, and that he failed to do so; and it requires no argument to demonstrate the proposition that a promise to pay is not payment, either in fact or in law. It also seems to me that all the testimony concerning the alleged fraudulent transactions between the

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Merchants and the agreement made by Robert Merchant with Mrs. Franklin to pay the note was wholly irrelevant, and should have been excluded by the court. Nor do I think the defendant waived any of his legal rights by going to trial, without objection, upon the pleadings, as made up by the parties to the action. The question of conspiracy between the Merchants and Stewart to defraud plaintiff was set up in her reply to defendant's answer. It tendered an immaterial and collateral issue, and I am unable to perceive how the denial of such allegations could, in any way, justify the introduction of testimony touching the same which was objected to by the defendant. In an equitable action against Robert and Andrew Merchant to compel a surrender and cancellation of the note and mortgage, such testimony would have been relevant and proper; and it may be that the facts and circumstances would have warranted the court, in that event, in granting the relief demanded. But in this action the sole question to be determined was whether or not the taking and selling of plaintiff's chattels by the defendant was wrongful, and not whether some other person or persons were guilty of perpetrating a fraud upon the plaintiff; and, in my judgment, the plaintiff should have been confined to the trial of the former question. For the foregoing and other reasons that might be given, I am of the opinion that the judgment of the court below should be reversed, and a new trial granted.

HOYT, J., concurs.

[No. 114. Decided January 26, 1891.]

ROBERT TRAVIS, ALFRED LEE, J. S. MAXFIELD, SMITH  
TROY, W. L. CHURCH AND W. C. WILLIAMS v. WIL-  
LIAM WARD AND JAMES LAWRENSON.

APPEAL — EXCEPTIONS — COUNTY COMMISSIONERS — ILLEGAL CON-  
TRACT — ESTOPPEL.

Where judgment is given on the pleadings in an equity case, an appeal may be maintained therefrom, though no exception is taken.

Although the contract of county commissioners for the building of a county road may be illegal, and the issue of warrants in payment therefor unauthorized in excess of a certain amount, the payment of such warrants will not be enjoined at the suit of taxpayers who themselves signed a petition for said improvement, had knowledge of the contract at the time it was made, and stood by and permitted the work to be carried on without objection until the road was completed.

*Appeal from Superior Court, Clallam County.*

The facts are fully stated in the opinion.

*Hays & Plumley*, for appellants.

A court of equity will never lend its aid to an inequity. 2 Story, Eq. Jur. § 959; *Clark v. Dayton*, 6 Neb. 203; *Brown v. Merrick County*, 18 Neb. 355. The appellees are estopped from now questioning the propriety of paying the warrants. 2 High, Inj. § 1260; *Sleeper v. Bullen*, 6 Kan. 300; *Weber v. San Francisco*, 1 Cal. 455; *Hitchcock v. Galveston*, 96 U. S. 341.

*John Trumbull*, for appellees.

A board of county commissioners can exercise no powers which are not in express terms, or by fair implication, conferred upon it by law, and whenever the board ventures beyond the scope of its powers its acts are void, and not binding upon the county. *Martin v. Whitman County*,

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1 Wash. 533; *Hodges v. City of Buffalo*, 2 Denio, 110; *Thomson v. Lee County*, 3 Wall. 327; *Wells v. Supervisors*, 102 U. S. 625; *Lebeher v. Board of Commissioners*, 9 Mont. 315 (23 Pac. Rep. 714); Dill. Mun. Corp. (3d ed.) §§ 457, 89. The act of February 2, 1888 (Laws 1887-8, p. 195), is a limitation upon the commissioners limiting the amount that can be expended for road purposes for each year, and all warrants or appropriations over that amount are void. *People v. Hall*, 8 Col. 485 (9 Pac. Rep. 34); *People v. May*, 9 Col. 80 (10 Pac. Rep. 641), and 9 Col. 414 (15 Pac. Rep. 36); *Catron v. Board of Commissioners*, New Mex. Feb. 1889 (21 Pac. Rep. 60); *People v. May*, 9 Col. 404 (12 Pac. Rep. 838); *Schwartz v. Wilson*, 75 Cal. 502 (17 Pac. Rep. 449); *Orampton v. Zabriskie*, 11 Otto, 601; Dill. Mun. Corp. (3d ed.) §§ 25, 89; *Clark v. City of Des Moines*, 19 Iowa, 199 (87 Am. Dec. 423).

The opinion of the court was delivered by

SCOTT, J.—It is alleged by the complaint in this case that appellant W. C. Williams entered into a contract with appellants Robert Travis, Alfred Lee and J. S. Maxfield, the board of county commissioners of Clallam county, and purporting to act in behalf of said county therein, to improve a certain highway or county road; and that said commissioners issued to said Williams county warrants therefor in the sum of \$13,800.95. It is further alleged that the total valuation of the assessable property of said county at that time was but \$501,267, and that there was no money in the county treasury for the purpose of building roads, nor was any thereafter appropriated for such purpose. The appellees brought this action as taxpayers of said county against said Williams and said county commissioners, and also against Smith Troy and W. L. Church, the auditor and treasurer of said county, to enjoin the payment of the warrants. The defendants answered, alleging

good faith upon the part of Williams and the commissioners; that they believed they had a lawful right to enter into the contract; and that the same was made by the commissioners in response to numerous signed petitions by the residents and taxpayers of said county, and that the appellees themselves signed one of said petitions, had full knowledge of the contract at the time it was made, and of all the work performed thereunder during the pendency thereof; that they stood by and permitted said work to proceed without objection until the road was completed and warrants issued. No reply was filed to these matters alleged in the answer, and both parties moved the court for judgment on the pleadings—the plaintiffs on the ground that the matters set up in the answer constituted no defense, and the defendants on the ground that, the plaintiffs having failed to reply, the affirmative defense must be taken as true, and that it was sufficient. The court rendered judgment for the plaintiffs, and the defendants appeal.

The first proposition we are met with is, that no exception was taken by appellants to the action of the superior court in the premises. But as this is an equity case, and as it was submitted to the lower court upon the facts as shown by the pleadings, we think an appeal from the judgment on the facts can be maintained, although an exception was not taken. Had these matters been stricken from the answer the case would be different, and an exception would be necessary, but the court simply held them, while true, to be immaterial, and rendered a decree for the plaintiffs.

Under the allegations of the complaint, which are taken as true for the purpose of this hearing, the contract in question was illegal, and the issue of the warrants in question, or the greater portion of them at least, was clearly unauthorized. While the county commissioners have a

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general supervision over county roads, with power to lay out and establish, etc., as provided by § 2673 of the code, they must proceed according to law, and as there were on moneys on hand for the purpose of improving highways, and as the commissioners only had authority to appropriate therefor two-tenths of one per cent. on the amount of taxable property of such county, shown by the last preceding assessment, as provided by an act of the legislature, approved February 2, 1888 (See Sess. Laws 1887-88, p. 195), it follows that any attempted incurring of such indebtedness in excess thereof was without lawful authority. While this is true, however, equity will not permit persons standing in the position of these plaintiffs, if the matters pleaded in the answer hereinbefore stated are true in fact, to directly encourage the commission of an unlawful act of this character, stand by and permit the work to be carried on in pursuance thereof without objection, by which they, in common with the other citizens and property owners of the county, are benefited, to take advantage of their own wrong in the premises, and enjoin payment of the indebtedness therefor so undertaken to be incurred. See *Brown v. Merrick Co.*, 18 Neb. 355 (25 N. W. Rep. 356); *Sleeper v. Bullen*, 6 Kan. 300; *Weber v. City of San Francisco*, 1 Cal. 455. For this reason the judgment is reversed. But, instead of rendering a final decree, it is thought best, in view of the condition of this case, to send it back, allowing the parties to file amended pleadings, and the plaintiffs to reply, if desired, that there may be an opportunity for a retrial upon the evidence; and it is remanded accordingly.

ANDERS, C. J., and HOYT, DUNBAR, and STILES, JJ.,  
concur.

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Opinion of the Court—STILES, J.[2 Wash.]

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[No. 138. Decided January 26, 1891.]

PAULINE A. KNOX v. C. M. PARKER AND W. H.  
LANCASTER, *Copartners.*

REAL ESTATE AGENTS—REVOCATION OF AUTHORITY—COMMISSIONS.

Where the owner of real estate contracts with an agent for its sale, if there is no limit of time fixed between the parties, the agent's authority may be revoked at any time; and if, at the time of the revocation, the agent had a negotiation pending for the sale, which is afterward continued and consummated by the owner, the agent is entitled to his commission.

*Appeal from Superior Court, Spokane County.*

The facts are fully stated in the opinion.

*James B. Jones, and C. S. Voorhees, for appellant.*

*Griffitts, Moore & Feighan, for appellees.*

The opinion of the court was delivered by

STILES, J.—The appellees brought suit against the appellant for a real estate agent's commission, alleging that their compensation was to be \$500, payable when they should effect a sale, and that they had not been paid. The answer was a general denial. From a judgment upon a verdict for the full sum demanded, this appeal was taken.

The undisputed facts would appear to be that the appellant was the owner of certain real estate in Spokane Falls, which she was desirous to sell, and on or about the 27th day of March, 1889, Lancaster, who was a member of a firm doing business in that city as real estate agents, called upon her, and solicited an employment as agent to sell her property. Appellant assented to the proposition, and agreed to pay \$500 as a commission upon the sale. On the 16th day of April following, a sale of the property was made to one Edwards for \$27,000. The disputed matters



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Opinion of the Court—STILES, J.

on the part of the appellant were that she stipulated that the employment should continue but for three days, at the price of \$26,250; that after that she would not sell at that price, but would ask a higher price, and would sell it herself; that at the expiration of about five days, no sale having been made or proposed, she notified appellees in writing that their employment had ceased, and that the sale made was without their assistance, or, if made through any assistance of theirs, it was without her knowledge, and they did nothing until after the expiration of the three days stipulated, and the service of notice that their employment was terminated. The appellees denied all these claims on the part of the appellant, and insisted that no time was mentioned in which the sale should be made, and no price was fixed; but that Lancaster, on his visit of solicitation, after he had secured appellant's agreement to pay him a commission, told her he had a person in view as a purchaser, Mr. Edwards, a person who was not on speaking terms with appellant, and whom Lancaster did not wish informed that his firm had anything to do with the sale; that appellant agreed to receive a proposition directly from Edwards, and to conduct the entire transaction herself, without Lancaster's apparent interference; that Lancaster proposed the matter to Edwards before the latter had ever had any conference with appellant; and that the subsequent sale was the result of his efforts—all of which, in turn, the appellant stoutly combatted. The appellees admitted the receipt of the notice of the termination of their employment, the destruction of the paper, and the substantial purport of its contents, as claimed by appellant, but maintained that it did not reach their hands until after their work was done, viz., the suggestion of the purchase to Edwards, which was followed up by the sale of the property to him.

This matter, with the question whether there was a

three days' limit to the contract for a commission, constituted the real issues which went to the jury; for the appellant, by her witness Edwards, showed that it was through Lancaster that he received the first suggestion that he might be able to purchase appellant's property, and was urged to see her in reference to it. The matter of the limited time for the sale was fairly submitted to the jury by the court by its instruction on that point. But it is contended that the charge on the subject of the notice contained serious error. It was as follows:

"But, if you believe that there was no limit upon this contract as to the time in which the sale should be made, then the plaintiff would have a reasonable time in which to effect a sale, virtually effected the sale, or if, before they had virtually performed the contract, she saw fit not to rescind the contract, because she would have no right to rescind the contract under any circumstances, but she would have a right to break it at any time, taking the lawful consequences, whatever that might be; so I instruct you that if, before they had performed the contract on their part, she sent this note discharging these men from that contract, that that would be a breach of it, and they could not recover in this action, because they have brought this action upon the theory that they performed the contract; that the contract was broken by her in failing to pay the money, and not in discharging or annulling the contract before they performed it. If she annulled the contract by this method I have indicated, before they virtually performed or substantially performed the contract on their part, why, then, they can recover in this action, although she sent the note, because she could not escape her liability after that by sending it.'

The action was brought upon an express contract to pay \$500, if appellees should be instrumental in effecting a sale of appellant's property, the only difference between this case and one of ordinary real estate agent's employment being that the amount of the agent's compensation was fixed by the agreement, whereas, usually, the fee of the agent is a

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Jan. 1891.]Opinion of the Court—STILES, J.

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percentage or a sum representing the value of the service. In this case, therefore, while the appellees, if there was no limit of time fixed between the parties, had full authority to go on and find a purchaser ready, able and willing to take the property, appellant could at any time revoke their authority, and put an end to their employment. If, moreover, a reasonable time should not have elapsed between the date of giving the authority and its revocation, the agent could usually recover his reasonable outlay and the value of his services in endeavoring to make a sale. And if, at the time of the revocation, the agent should have a pending treaty with a proposing purchaser, who afterwards, by a continuance of the same negotiations with the principal himself, actually buys the property, the agent would have fully earned his commission, since the principal in such a transaction cannot arbitrarily cut off the agent's authority, in the midst of what would be a successful agency, and then, although himself taking advantage of the agent's services, refuse him compensation. This was the law of the case, but it was not so given to the jury. While the language used, taking it altogether, is perhaps susceptible of a construction similar to the rule laid down above, it is very doubtful whether a jury, hearing it read as pronounced orally by the judge, would get any such idea of the law from it. It deals in very strong expressions, such as, "She would have no right to rescind the contract under any circumstances, but she would have a right to break it any time, taking the lawful consequences," etc. That part of the charge which informs the jury that the plaintiffs must recover upon the theory that they had fully performed the contract, and not that they had been discharged prematurely, the appellant cannot complain of. But the remainder of it, which told the jury that if when the note was sent the plaintiffs had "performed the contract on their part," they could recover in this ac-

tion, was misleading, since nowhere were the jury told the elements necessary to constitute the "performance" of the "contract" by the appellees, unless it is to be found in an earlier part of the charge, where the court said that the doing of "any service which was the moving or procuring cause in effecting the sale was sufficient to warrant a recovery." This latter clause is, however, just as objectionable, since there was coupled with it no explanation whatever of what was meant by "moving or procuring cause." The jury should have been told clearly that in order to entitle appellees to recover, if they found a sale had been made, the purchaser must have been induced to buy through their efforts in calling his attention to the property prior to the note of revocation. The jury would have understood that, but they would have been very likely to misinterpret what was said, especially when informed that the appellant "would have no right to rescind the contract under any circumstances." The error thus committed we consider sufficient ground for reversal.

The appellant, however, further claims that, by numerous turns of expression in the charge, the court transgressed the constitutional rule against charging juries in respect to matters of fact or commenting thereon, and strongly intimated to the jury his opinion that appellees should recover. The latter imputation we do not think sustained, but several unguarded expressions came very near sustaining the former one. As it is not necessary to this decision that we particularize them, we shall only make them a basis for remarking that our constitutional provision on this subject is very strong, and that it behooves the judges, when called upon to charge juries, to exercise very great caution to avoid error in this particular. In an oral charge the danger is especially great that some chance allusion to a controverted fact, as though it were

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Jan. 1891.]Opinion of the Court—STILES, J.

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established by the evidence, may overturn what is really a just verdict. Take the following:

“There is some evidence here tending to show that, after the bargain was entered into, Mrs. Knox sent a note to the plaintiffs, upon the terms of which they were discharged from any further service in regard to the matter. There is some dispute about what this note contained. This is a matter for your determination alone as to what it did contain.”

The language used in the first sentence, that there was “some evidence tending to show” the sending of a note, would seem to throw a doubt as to whether a note was sent or not; whereas, both parties agreed that the note had been sent and received. And, again, the words “after the bargain was entered into” leaves it doubtful whether the court meant by “bargain” the employment of appellees as agents, or the agreement of Edwards to buy. The attention of the jury was directed only to the ascertainment of what the note contained, coupled with a statement that, if appellees had performed their contract before it was sent, the appellant could not be allowed to escape liability at that time by any method of that kind. No question was submitted as to when, in relation to the “bargain,” the note was sent, unless “bargain” meant the employment of the appellees merely; but a juror might well query whether the court were not assuming the time of sending the note as after the sale to Edwards had been agreed upon, thus telling them his views of that matter. Appellees contend here that the action of the court in allowing the appellant to testify as to the contents of the note, before it appeared that the original could not be produced, was error; and because of that error the court’s entire instruction on the subject of the note was error, and not prejudicial to the appellant; but the matter is disposed of through the incorrectness of the first supposition, since Lancaster, in his testimony in chief for the appellees, not

only stated that he had received the note, but gave its contents, and showed that he had destroyed it, thus opening the way to appellant to contradict him as to the time of his reception of the note, and as to its contents, and thus also allowing her to avail herself of the legal effect of the note as fully as though she had pleaded it in her answer, no objection having been made to the introduction of this as an affirmative matter of defense, although not pleaded. The judgment will be reversed, and a new trial granted, with costs to appellant. It is so ordered.

ANDERS, C. J., and SCOTT and HOYT, JJ., concur.

DUNBAR, J.—I concur in the result, for the reasons stated, and for the further reason that the statement of the judge that “there was some evidence tending to show that a certain note has been sent by defendant,” etc., was a violation of the rule in regard to judges commenting on the testimony. What the law governing the case is, is for the judge to state. What the evidence shows, or tends to show, is within the exclusive jurisdiction of the jury.

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[No. 159. Decided February 2, 1891.]

THE STATE OF WASHINGTON V. CITY OF SPOKANE  
FALLS.

LIQUOR LICENSE FEES — APPORTIONMENT — SPECIAL LAWS RE-  
PEALED BY GENERAL — CONSTITUTIONAL LAW.

The provisions of the city charter of Spokane Falls permitting the city to license and tax bar-rooms, drinking shops and saloons, and keep all moneys that shall come to the city by taxation or otherwise, are repealed by the later general law approved February 2, 1888 (Laws 1887-88, p. 124), providing that ten per cent. of liquor license fees received by each incorporated city, town or village in Washington Territory shall be paid into the territorial treasury.

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Feb. 1891.]Argument of Counsel.

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The act approved February 2, 1888, entitled "An act to regulate, restrain or prohibit the sale of intoxicating liquors," does not contravene the provision of the organic act of the territory (Rev. St. U. S., § 1924), requiring an act to embrace but one subject, which shall be expressed in the title.

*Appeal from Superior Court, Spokane County.*

The facts are fully stated in the opinion.

*W. C. Jones*, Attorney-General, for The State.

It is well settled that municipal charters and other special laws may be repealed or amended by a general law, provided the intention of the legislature to do so is apparent. Dill. Mun. Corp., § 85; Cooley, Const. Lim., pp. 228-231; End. Interp. St., §§ 230, 201. As to the effect of a general law inconsistent with the provisions of municipal charters, see *State v. Hitchcock*, 1 Kan. 178; *McGregor v. Baylies*, 19 Iowa, 43; *Von Phul v. Hammer*, 29 Iowa, 222; *Andrews v. People*, 75 Ill. 605; *Culver v. Bank*, 64 Ill. 528; *Board, etc. v. Chicago*, 14 Ill. 334. To the effect that an act which is a general revision of the entire subject to which it relates will, by implication, repeal all prior statutes on that subject, see End. Interp. St., § 201; *State v. Conkling*, 19 Cal. 501; *Norris v. Orocker*, 13 How. 429; *United States v. Tynen*, 11 Wall. 88; *King v. Cornell*, 106 U. S. 395; *Lyddy v. Long Island City*, 104 N. Y. 218; Bish. Written Laws, §§ 158-163.

*P. F. Quinn*, City Attorney, for appellee.

A general law will not repeal or amend a special law, unless it is the manifest and clear intention of the legislature so to do, which must be gathered from the language used in the act, and, with this principle in view, the Session Laws of 1887-8, p. 124, ought not to be so construed, when only taking its language into consideration. *McKenna v. Edmundstone*, 91 N. Y. 231; *People v. Jaehne*, 103

N. Y. 204; *Whipple v. Christian*, 80 N. Y. 523; *Gloversville v. Howell*, 70 N. Y. 287; *Van Denburgh v. Greenbush*, 66 N. Y. 1; *Wood v. Election Commissioners*, 58 Cal. 561; *Ottawa v. La Salle Co.*, 12 Ill. 339; *Board of Supervisors v. Campbell*, 42 Ill. 490; *Hume v. Gossett*, 43 Ill. 297; *Covington v. East St. Louis*, 78 Ill. 549; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *State v. Branin*, 23 N. J. Law, 484; *State v. Morristown*, 34 N. J. Law, 445; *State v. Trenton*, 36 N. J. Law, 499; *Walworth County v. Whitewater*, 17 Wis. 193; *Dewey v. Central Car & Mfg. Co.*, 42 Mich. 402; *Fosdick v. Perrysburg*, 14 Ohio St. 472; *State v. Wright*, 14 Or. 365; End. Interp. St., §§ 227, 228, and cases cited.

The act of February 2, 1888, is void on account of being in conflict with § 1924 of the organic act. The evident object and purpose of the law in question was to raise revenue for the State of Washington, and the title is as follows: "To regulate, restrain and prohibit the sale of intoxicating liquors." Certainly there is nothing in that title which would call the attention of the legislature or the people to the idea that the bill was intended to amend or repeal each and every charter of the State of Washington, and in support of our position we call attention to the following cases: *Wood v. Election Commissioners*, 58 Cal. 561; *Stewart v. Father Matthew Society*, 41 Mich. 71; *King v. Banks*, 61 Ga. 20; *Ex parte Conner*, 51 Ga. 571; *Parish of Bossier v. State*, 13 La. Ann. 433; *Smails v. White*, 4 Neb. 353; *Outlip v. Sheriff of Calhoun*, 3 W. Va. 588; *State v. Everage*, 33 La. Ann. 120; *State v. Wright*, 14 Or. 365; *Huber v. People*, 49 N. Y. 132; *Ex parte Thomason*, 16 Neb. 238 (20 N. W. Rep. 312, and cases cited); *Grover v. Trustees Ocean Grove Camp Meeting Ass'n*, 45 N. J. Law, 399, and cases cited; Cooley, Const. Lim. (5th ed.), pp. 81-83, 141-143, 150.



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Feb. 1891.] Opinion of the Court — ANDERS, C. J.

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The opinion of the court was delivered by

ANDERS, C. J. — This was an action by appellant to recover from appellee ten per cent. of the amount collected by it for licenses for the sale of intoxicating liquors from the 2d day of April, 1888, to the month of December, 1890. The complaint alleges that during said time defendant collected and received into its treasury the sum of \$102,000 for such licenses, all of which it converted to its own use, and refuses to pay any part thereof to the plaintiff. To this complaint the defendant interposed a general demurrer, which was sustained by the court. Judgment was accordingly entered for the defendant, from which plaintiff appealed to this court.

By an act of the legislature of the late territory, approved January 29, 1886, entitled "An act to amend an act entitled 'An act to amend an act to incorporate the city of Spokane Falls, approved November 28, 1883,'" it is provided that the city shall have power to license, tax, regulate and restrain bar-rooms, drinking shops or saloons, and that the city treasurer must receive and keep all moneys that shall come to the city by taxation or otherwise, and pay out the same upon the warrant of the mayor attested by the clerk. The most material question for our consideration in this controversy is whether the provisions of the act above mentioned are repealed by a later general law, approved February 2, 1888, entitled "An act to regulate, restrain, license or prohibit the sale of intoxicating liquors." It is provided by section 2 of the latter statute that "the mayor and council, or other governing body, of each incorporated town or incorporated village in Washington Territory, shall have the sole and exclusive authority and power to regulate, restrain, license or prohibit the sale or disposal of spirituous, fermented, malt or other intoxicating liquors within the corporate limits of their re-

spective cities, towns or villages: *Provided*, . . . said license fee shall be paid annually in advance to the treasurer of the city, town or village, who shall pay ten (10) per cent. thereof into the general fund of the territorial treasury, and hand the remaining ninety per cent. into the general fund of the city, town or village treasury." It is contended by counsel for appellee that the general law will not repeal or amend the special act unless it is the manifest and clear intention of the legislature so to do, which must be gathered from the language used in the act itself, and that such an intention is not thus made to appear. This is conceded to be a correct general proposition of law by counsel for appellant, but he claims that, in this instance, the legislature has clearly manifested its intention to so repeal or modify the special charter of the appellee in so far as the general statute is inconsistent therewith, for the reason that the act of February 2, 1888, is a general revision of all prior laws relating to the same subject, and obviously designed to supersede them. An examination of the charters of the various municipal organizations throughout the territory discloses the fact that while they were generally clothed with the power to license and regulate the disposal of spirituous and intoxicating liquors within their respective limits, there was no uniformity of rule as to the disposition of the funds collected from licenses. Some of the charters required a portion of the moneys collected for licenses to sell intoxicating liquors to be paid into the county treasury, while others permitted the municipal corporations to retain the entire amount. From these considerations we are led to believe that the legislature in passing the act of February 2, 1888, intended to enact a general law which should supersede, and which did supersede, all prior laws on the same subject, either general or special.

Appellee further contends that the statute of 1888 is obnoxious to the objection that the object is not expressed

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Syllabus.

in its title, and that it is therefore void as contravening § 1924 of the organic act of the territory; but we think the objection is manifestly not tenable.

Before closing this opinion it is proper to remark that at the time of the passage of the act of 1888 there was no city, town or village incorporated in the Territory of Washington, otherwise than by special act. And it is, therefore, obvious that § 2 of said act must have been intended to apply to and modify the special charters of municipal corporations then existing. For the foregoing reasons, the judgment of the court below is reversed and the cause remanded, with instructions to overrule the demurrer.

STILES, HOYT, SCOTT, and DUNBAR, JJ., concur.

[No. 155. Decided February 5, 1891.]

SPOKANE TRUCK AND DRAY COMPANY V. J. GUS.  
HOEFER AND MINA HOEFER.

NEGLIGENCE — NECESSARY CARE — INSTRUCTIONS — PUNITIVE  
DAMAGES.

Where the court has already instructed the jury that if it did not appear by a preponderance of the evidence that the injury was occasioned by defendant's negligence they should find for defendant, it is not error for the court to refuse to instruct that if the injury occurred by defects in the wall caused by the elements, which were not discovered by ordinary care, the plaintiff cannot recover in the absence of further negligence on the part of the defendant.

A person hoisting a heavy safe in a public thoroughfare where people are constantly passing is bound to use such care as the nature of the employment and the situation and circumstances of the same require of a prudent person experienced and skilled in such or similar work.

The doctrine of punitive damages is unsound in principle, and such damages cannot be recovered in this state, although the defendant may have been guilty of gross negligence.

2	45
5	624
5	708
6	29
6	318
25*	1072
32*	468
33*	787
33*	1016
33*	653
2	45
8	159
25*	1072
35*	620
2	45
12	17
2	45
40	312

*Appeal from Superior Court, Spokane County.*

The facts are fully stated in the opinion.

*Turner & Graves, and W. C. Jones, for appellant.*

The better rule always was that punitive damages had no proper place in the law, and while we admit that the weight of authority is in favor of their allowance, the later and modern authorities are against it, and in many states where the doctrine is too firmly fixed to be rooted out by judicial decisions, the courts have felt called on to deplore the fact that the contrary rule was not originally established. 2 Greenl. Ev., § 253, and note 2; 3 Pars. Cont. (6th ed.), 171; *Fay v. Parker*, 53 N. H. 342 (16 Am. Rep. 270); *Bixby v. Dunlap*, 56 N. H. 465 (22 Am. Rep. 475); *Smith v. Holcomb*, 99 Mass. 552; *Meagher v. Driscoll*, 99 Mass. 281 (96 Am. Dec. 759); *Fillebrown v. Hoar*, 124 Mass. 580; *Stewart v. Maddox*, 63 Ind. 57; *Koerner v. Oberly*, 56 Ind. 284 (56 Am. Rep. 34); *Boyer v. Barr*, 8 Neb. 68 (30 Am. Rep. 814); *Welch v. Ware*, 32 Mich. 84; *Elliott v. Van Buren*, 33 Mich. 49 (20 Am. Rep. 668); *Stilson v. Gibbs*, 53 Mich. 280; *Murphy v. Hobbs*, 7 Col. 541; (49 Am. Rep. 366); *Brown v. Swineford*, 44 Wis. 282 (28 Am. Rep. 582); *Quigley v. Ry. Co.* 11 Nev. 350 (21 Am. Rep. 757).

*Jesse Arthur, for appellee.*

The opinion of the court was delivered by

DUNBAR, J.—The plaintiff, Mina Hoefer, had her arm broken and was otherwise injured by the falling of a safe, which was being hoisted by the defendant into a five-story brick building, known as the “Eagle Block,” in the city of Spokane Falls. Plaintiff had been to the office of her physician in the second story of said building, where she was accustomed to go for treatment daily, and while returning from such a visit on the 7th day of February, 1890,

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Opinion of the Court—DUNBAR, J.

she passed down the stairway and into the court or opening under the hoisted safe just as it fell. The said stairway started from the entrance of said court, or well, on Stevens street, and landed on the north end of the covered way on the second floor of the rear building. Dr. Thiel's office, where Mina Hoefer had been just before she was injured, was in a room on the second floor of the Stevens street building, and was the first room north of the Stevens street entrance. There was one other and perhaps main entrance to the building from Riverside avenue, and it is claimed by the defendant that the court, or well, on that side of the block was used for hoisting heavy articles to the upper stories of the building, and was not generally employed by the public as an entrance to the upper stories of the block; yet we think it fairly appears that the stairway leading from Stevens street was in common use, and that the plaintiff had a right to use it in going to and from the office of her physician. Suit was brought against the defendant, alleging damages in the sum of \$5,000. The case was tried by a jury and a verdict rendered for plaintiffs for \$2,500, and a judgment rendered for the same, from which judgment an appeal was taken to this court.

The defendant assigns as error the following instructions to the jury, given by the court upon its own motion:

"Furthermore, gentlemen, the plaintiffs claim in this action that the defendant was not only guilty of negligence, by reason of which the plaintiff was damaged, but was guilty of gross negligence, and, in case you find they were guilty of gross negligence, a different rule of damages applies to the case." "Gross negligence' means a wanton and reckless disregard of the rights of other persons, taken into consideration with the facts in the case; and, in case you find that it was, then, in addition to the actual damages which you may find for plaintiff, you may assess a sum which the law calls 'exemplary damages.' That means a damage to deter others from being wanton and reckless of the rights of others."

Also the following instructions asked by plaintiffs:

“If the jury believe from all the evidence that the agent and employes of defendant, the Spokane Truck and Dray Company, in placing the beams and planks across the well-hole, in plaintiffs’ petition mentioned as being in the Eagle block, in the city of Spokane Falls, and in any other way, in the construction and preparation of the appliances for hoisting the safe up and through said well-hole, and, in the hoisting of the same, failed to use such care as the nature of the employment, and the situation and circumstances surrounding the same, required of a prudent person, having had experience and skilled in such or similar work, and that, by reason thereof, said beam and planks, and other appliances, in the attempt to hoist said safe, gave way, or were broken, and fell down through said well-hole, striking plaintiff, Mina Hoefer, breaking her arm, and otherwise injuring her, they should find for plaintiff, assessing the damage, if any, at such sum as they find she has sustained, not exceeding \$5,000, the amount claimed in the complaint.”

“The jury is instructed that, if they find for plaintiff under the preceding instruction, in assessing the damage, they have a right to consider and allow for the loss of the personal services of plaintiff, Mina Hoefer, to her family; her mental suffering and bodily pain; the extent of probable duration of the injury; and the prospective loss of service occasioned thereby; also the expense incurred for medicine, nursing, etc., and such reasonable doctor bill as plaintiffs were obligated to pay.”

“Should the jury find for plaintiffs under instruction No. 1, and also find that defendant’s agents and employes, in constructing the appliances for hoisting said safe, and in hoisting the same, were guilty of gross negligence, that is, exercised so little care as to evince a reckless and willful indifference to the safety of plaintiff, Mina Hoefer, and all others using said entrance and stairway, then they may find for plaintiffs exemplary damages; that is, damages in money by way of punishment, in addition to the damages they may find under instruction No. 2, in no case exceeding in all the amount of \$5,000 claimed in the complaint.”

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Feb. 1891.] Opinion of the Court — DUNBAR, J.

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The court refused to give the following instruction asked by the defendant, which refusal defendant also assigns as error :

“If you find by the evidence that the injury occurred by defects in the wall, caused by the elements, and such defects were not discovered by ordinary care, in the absence of further negligence on the part of the defendant, the plaintiff cannot recover.”

So far as the instruction is concerned that was asked for by defendant and refused by the court, we think it had already been substantially given by the court; and it was not necessary to repeat it in another form of words. The court had already instructed the jury that “if it did not appear by a preponderance of testimony that this injury was occasioned by the negligence of the defendant, that it was their duty to find for the defendant.” Courts should not be called upon to particularize by referring to certain portions of the testimony. It is a far safer rule to state the law governing the case in general terms.

It is claimed by the defendant that the language used by the court in the first instruction asked by plaintiffs makes the defendant an actual insurer of the safety of the public, and is therefore erroneous. The statement was “that the defendant was bound to use such care as the nature of the employment and the situation and circumstances surrounding the same required of a prudent person having had experience, and skilled in such or similar work.” We are unable to see how this instruction could be materially modified. Undoubtedly the “nature of the employment” must be taken into consideration. If it is an employment which is likely to endanger life or property, certainly a greater degree of care would be required than an employment the careless performance of which would not ordinarily result in injury to person or property. It is plain that “the situation and circumstances surrounding the

employment" must be considered; for, applying the rule to a case of this character, a person in hoisting a heavy weight in an unfrequented place, in no way connected with any thoroughfare or passage-way, would not be held to the same degree of care as he would be if the work were being done in a public thoroughfare, where people had a right to pass, and were actually constantly passing. It certainly cannot be gainsaid that "prudence" should be one of the requisite qualifications of a person engaged in such employment. Nor must his qualifications stop here, when engaged in a business which is liable to injuriously affect the public; for he might be an ordinarily prudent man, and yet, if he had no experience or skill in the particular work in which he is engaged, disastrous results would be liable to follow. Language which is not technical must be construed by its ordinarily accepted meaning, and we do not think the language employed by the court could be so construed as to make the defendant an insurer; and we concur with the counsel for the plaintiffs that it states substantially the same doctrine as the quotation from Shearman & Redfield on Negligence, § 47, by defendant, where they define ordinary care to be "the care usually bestowed upon the matter in hand by persons accustomed to deal with such matters, and having the average prudence of the general class of society to which the person whose conduct is in question belongs."

[ We next pass to the instruction of the court, both upon its own motion and upon the motion of the plaintiffs, in relation to punitive damages. This is a question which has engaged the earnest attention of courts and authors. A careful investigation of the discussion of this subject by such noted authors as Greenleaf, Sedgwick and Parsons, and also other eminent text-writers, and by numerous courts, shows a wonderful diversity of opinion on this interesting subject. The weight of authority, especially con-



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sidering the older cases, seems to be in favor of the doctrine of punitive damages ; but the opposite doctrine has received the support and advocacy of many modern writers, and the judicial sanction of many modern courts ; while other courts have frankly stated their repugnance to the doctrine, yet considered themselves bound by former decisions in their respective states to still maintain it, appealing to the legislature to relieve them from what they believe to be a pernicious practice. In this state it is a new question, and the court approaches its investigation untrammelled by former decisions, free to accept the reasoning which most strongly appeals to its judgment, and to adopt the rule which, in its opinion, will simplify judicial proceedings, and lead to the least embarrassing complications in the administration of the law, and the determination of rights thereunder. And this desired *ultimatum*, we think, will best be attained by adopting the rule laid down by Mr. Greenleaf (volume 2, § 253), that “damages are given as a compensation or satisfaction to the plaintiff for an injury actually received by him from the defendant. They should be precisely commensurate with the injury, neither more nor less ; and this whether it be to his person or estate” — although it is stoutly maintained by so eminent an author as Mr. Sedgwick that this definition is too limited, and that wherever the elements of fraud, malice, gross negligence or oppression “mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms ‘punitive,’ ‘vindictive,’ or ‘exemplary’ damages ; in other words, blends together the interests of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender.” 1 Sedg. Dam. p. 38 ; 7th ed. p. 53. It seems to us that there are many valid objections to interjecting into a purely civil action the elements of a crimi-

nal trial, intermingling into a sort of a medley or legal jumble two distinct systems of judicial procedure. While the defendant is tried for a crime, and damages awarded on the theory that he has been proven guilty of a crime, many of the time honored rules governing the trial of criminal actions, and of the rights that have been secured to defendants in criminal actions "from the time whereof the memory of man runneth not to the contrary," are absolutely ignored. Under this procedure, the doctrine of presumption of innocence until proven guilty beyond a reasonable doubt finds no lodgment in the charge of the court, but is supplanted by the rule in civil actions of a preponderance of testimony. The fallacy and unfairness of the position is made manifest when it is noted that a person can be convicted of a crime, the penalty for which is unlimited save in the uncertain judgment of the jury, and fined to this unlimited extent for the benefit of an individual who has already been fully compensated in damages on a smaller weight of testimony than he can be in a criminal action proper, brought for the benefit or protection of the state, where the amount of the fine is fixed and limited by law; and, in addition to this, he may be compelled to testify against himself, and is denied the right to meet the witnesses against him face to face under the practice in civil actions of admitting depositions in evidence.

Exclusive of punitive damages, the measure of damages as uniformly adopted by the courts and recognized by the law is exceedingly liberal towards the injured party. There is nothing stinted in the rule of compensation. The party is fully compensated for all the injury done his person or his property, and for all losses which he may sustain by reason of the injury, in addition to recompense for physical pain, if any has been inflicted. But it does not stop here; it enters the domain of feeling, tenderly inquires into his mental sufferings, and pays him for any anguish of mind

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that he may have experienced. Indignities received, insults borne, sense of shame or humiliation endured, lacerations of feelings, disfiguration, loss of reputation or social position, loss of honor, impairment of credit, and every actual loss, and some which frequently border on the imaginary, are paid for under the rule of compensatory damages. The plaintiff is made entirely whole. The bond has been paid in full. Surely the public can have no interest in exacting the pound of flesh. Ordinarily the administration of the laws is divided into two distinct jurisdictions, the civil and the criminal, each governed by rules of procedure and by rules governing the admission and weight of testimony different and distinct from the other. The province of the civil court is, as its name indicates, to investigate civil rights. There its jurisdiction ends, or ought to end; while the province of the criminal court is, as its name imports, to investigate and punish crime and restrain its commission. And it is to the criminal and not to the civil jurisdiction that society looks for its protection against criminals. The object of punishment is not to deter the criminal from again perpetrating the crime on the particular individual injured, but for the protection of society at large; and as the state is at the expense of restraining and controlling its criminals, and as fines are imposed for the double purpose of restraining the offender and of re-imbursing the state for its outlay in protecting its citizens from criminals, we are at a loss to know by what process of reasoning, either legal or ethical, the conclusion is reached that a plaintiff in a civil action, under a complaint which only asks for compensation for injuries received, is allowed to appropriate money which is supposed to be paid for the benefit of the state. It is to be presumed that the state has fully protected its own interests, or as fully at least as they could be protected by laws, when it provides for the punishment of crime in its criminal statutes, and fixes the

fine at a sum which it deems commensurate with the crime designated; hence, punitive damages cannot be allowed on the theory that it is for the benefit of society at large, but must logically be allowed on the theory that they are for the sole benefit of the plaintiff, who has already been fully compensated; a theory which is repugnant to every sense of justice.

Again, while jurors should be the judges of the character and weight of testimony, that judgment should be exercised under some rule, and be amenable to some law, so that an abuse of discretion could be ascertained and corrected; but, under the doctrine of punitive damages, where the whole question is left to the unguided judgment of the jury, and where, under the very nature of the doctrine, no measure of damages can be stated, and hence no limits compelled, where there are no special findings provided for, it would not be often that a court would be warranted in interfering with a verdict, if indeed it could do so at all, if the verdict fell within the amount asked as compensatory damages. Take the case at bar for instance, and the court has no way of ascertaining whether the jury found that the plaintiff had actually been damaged to the full amount of \$2,500, or whether they found her actual damages to be \$500, and assessed the other \$2,000 by way of punishment. It seems to us that a practice which leads to so much confusion and uncertainty in the administration of the law, and that is always liable to lead to injustice, the correction of which is impracticable, cannot be too speedily eradicated from our system of jurisprudence. In this connection, we quote approvingly the language of the supreme court of Indiana in *Stewart v. Maddox*, 63 Ind. 51. Says the court: "The doctrine of exemplary or punitive damages rests upon a very uncertain and unstable basis. It is almost equivalent to giving the jury the power to make the law of damages in each case; and in a case where the defendant

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is a commanding, popular, influential person, and the plaintiff of the opposite character, and the local and temporary excitement or prejudice of the time happens to be in favor of the defendant, and against the plaintiff, the jury is apt to be reluctant in giving even pecuniary compensation without adding anything by way of exemplary or punitive damages; while, in a case in which the character of the parties and the circumstances are reversed, the jury will be liable to push their power to an unwarranted and unconscionable extent, dangerous to justice and the security of settled rights." Says the court in *Murphy v. Hobbs*, 7 Col. 541 (49 Am. Rep. 366; 5 Pac. Rep. 119): "The reflecting lawyer is naturally curious to account for this 'heresy' or 'deformity,' as it has been termed. Able and searching investigations made by both jurists and writers disclose the following facts concerning it, viz.: That it was entirely unknown to the civil law; that it never obtained a foothold in Scotland; that it finds no real sanction in the writings of Blackstone, Hammond, Comyns, or Rutherford; that it was not recognized in the earlier English cases; that the supreme courts of New Hampshire, Massachusetts, Indiana, Iowa, Nebraska, Michigan and Georgia have rejected it in whole or in part; that of late other states have falteringly retained it because committed so to do; that a few years ago it was correctly said, 'At last accounts the court of queen's bench was still sitting hopelessly involved in the meshes of what Mr. Chief Justice QUAIN declared to be "utterly inconsistent propositions;"' and that the rule is comparatively modern, resulting in all probability from a misconception of impassioned language and inaccurate expressions used by judges in some of the earlier English cases." And in support of this theory the Colorado court quotes Mr. Justice FOSTER in *Fay v. Parker*, 53 N. H. 342 (16 Am. Rep. 270), who concludes a discussion of the expression "smart money" as used by Grotius and jurists con-

temporary with that author, in the following language: "It is interesting, as well as instructive, to observe that one hundred and twenty years ago the term 'smart money' was employed in a manner entirely different from the modern signification which it has obtained, being then used as indicating compensation for the smarts of the injured person, and not, as now, money required by way of punishment, and to make the wrong-doer smart." Some courts have held that it was in violation of the constitutional guaranty "that no person should be twice put in jeopardy for the same offense," where the criminal code provided a punishment for the same offense, and some have restricted or limited its abrogation to cases where the act charged to have been committed was made punishable by law; but, without expressing any opinion on the constitutional question, we believe that the doctrine of punitive damages is unsound in principle, and unfair and dangerous in practice, and that the instruction of the court on the subject of punitive damages was erroneous. ¶ With this view of the law it is not necessary to examine the further objection urged by defendant, "that this was not a proper case for the application of the doctrine of punitive damages." } The judgment is reversed, and the case remanded for a new trial.

ANDERS, C. J., and HOYT, SCOTT, and STILES, JJ., concur.

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Syllabus.

[No. 55. Decided February 10, 1891.]

SKAGIT RAILWAY AND LUMBER COMPANY V. H. D. COLE.

CONTINUANCE—AMENDMENT—ABUSE OF DISCRETION—BREACH OF  
CONTRACT—DAMAGES—EVIDENCE—ARGUMENT OF COUNSEL.

The refusal of the superior court to grant defendant a continuance on account of the absence of its principal counsel, who, it was rumored, had been drowned, is not such an abuse of discretion as to justify a reversal of the judgment in a cause, especially where defendant was represented by other attorneys, and had proceeded to trial with the expectation that such counsel would arrive before any material progress had been made in the cause before continuance was asked for. (Hoyt, J., dissents.)

The refusal of the superior court to permit defendant to amend its answer so as to set up another defense, after the plaintiff had rested his case, which amendment would have necessitated a continuance to enable plaintiff to procure witnesses to meet the new defense, is not such an abuse of discretion as to justify a reversal of the judgment.

Under a contract whereby plaintiff was to cut timber on defendant's land at a certain rate of stumpage, and defendant was to furnish him with supplies during the continuance of the contract, the plaintiff in an action for breach thereof, can recover expenses incurred by him for repeated trips from his camp to defendant's store, made with a reasonable expectation of getting the supplies needed, based upon information furnished by defendant.

Where the complaint alleges that plaintiff was prevented from carrying on his business by reason of defendant's failure to furnish supplies, and that plaintiff could not procure and pay for supplies elsewhere, proof is admissible to show that plaintiff had attempted to procure supplies from other parties and had failed to get them.

In an action for breach of contract to furnish plaintiff supplies for carrying on certain logging operations, if defendant knew, when it entered into the contract, that plaintiff was unable to obtain the necessary supplies elsewhere, and that when it ceased furnishing same that plaintiff would be compelled to abandon the enterprise or be seriously embarrassed in its further execution, the measure of damages is the difference between the value of the logs which he could have put in the market with the full force he could have operated had the supplies been furnished as contracted, and the value of the logs he did put in with the diminished force, less the cost of getting out and handling such excess. (Hoyt, J., dissents.)

2	57
6	233
25*	1077
33*	309
2	57
8	101
25*	1077
35*	597
2	57
17	72
17	74
2	57
432	47
32	49
2	57
42	671

Where statements transgressing the reasonable limits of argument to a jury are made under an apparent *bona fide* belief that they are permissible under the proof, and no objection is made thereto at the time, the party aggrieved must be content with an instruction to the jury to disregard such statements

*Appeal from Superior Court, Skagit County.*

The facts are fully stated in the opinion.

*J. C. Haines*, for appellant.

The court should have granted a continuance because of the unavoidable absence of the defendant's counsel. *Radford v. Fowlkes*, 85 Va. 820 (8 S. E. Rep. 817); *Myers v. Trice*, 86 Va. 835 (11 S. E. Rep. 429); *Thompson v. Thornton*, 41 Cal. 626; *Rice v. Melendy*, 36 Iowa, 166; *Allen v. State*, 10 Ga. 85; *Shultz v. Moore*, 1 McLean (U. S.) 334; *Printup v. Mitchell*, 19 Ga. 586; *Rhode Island v. Massachusetts*, 11 Pet. 226; *Hunter v. Fairfax's Devisee*, 3 Dall. 305.

The court erred in admitting testimony in regard to the plaintiff's attempts to secure supplies elsewhere. The evidence should correspond with the allegations, and be confined to the point in issue. 1 Greenl. Ev. (14th ed.) p. 76, and cases there cited.

Profits which might have resulted but for a breach of the contract are too remote to constitute an element of damage. 3 Suth. Dam. 156, 157, note; 3 Pars. Cont. (7th ed.) 181-3; *McKinnon v. McEwan*, 48 Mich. 106 (42 Am. Rep. 458); *Blanchard v. Ely*, 21 Wend. 350 (34 Am. Dec. 250); *Ward v. Railroad Co.*, 47 N. Y. 29 (7 Am. Rep. 405); *Freeman v. Clute*, 3 Barb. 424; *Giles v. O'Toole*, 4 Barb. 261; *Hadley v. Baxendale*, 9 Exch. 341 (S. C. 26 Eng. L. & Eq. 398); *Green v. Williams*, 45 Ill. 206; *Frazer v. Smith*, 60 Ill. 145; *Rhodes v. Baird*, 16 Ohio St. 573; *De La Zerda v. Korn*, 25 Tex. Supp. 188; *Gilpins v. Consequa*, 1 Pet. C. C. 85; *Yates v. United States*, 15 Ct. of Cl. 119; *Manhattan Stamping Works v. Koehler*, 45 Hun, 150; *Harper v. Weeks*, 89



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Argument of Counsel.

Ala. 577 (8 South. Rep. 39); *Russell v. Giblin*, 10 N. Y. Supp. 315; *Bazin v. Steamship Co.*, 3 Wall. Jr. 229.

"All courts agree that it is the duty of the presiding judge, either upon his own notion or upon the request of the opposing party or his counsel, to interpose and check the party or his counsel in an improper and prejudicial line of argument." *Tucker v. Henniker*, 41 N. H. 317; *Bulloch v. Smith*, 15 Ga. 395; *Mitchum v. State*, 11 Ga. 615; *Dickerson v. Burke*, 25 Ga. 225; *Forsythe v. Cothran*, 61 Ga. 278; *Davis v. Hill*, 75 N. C. 224; *Hoxie v. Home Ins. Co.*, 33 Conn. 471; *School Town of Rochester v. Shaw*, 100 Ind. 268; *Crawford v. State*, 15 Tex. App. 501; *State v. Young*, 99 Mo. 666 (12 S. W. Rep. 879).

*Ronald & Piles*, for appellee.

A motion for a continuance is a matter addressed to the discretion of the trial judge, and it has often been held that its refusal affords no ground for an appeal. *Dial v. Insurance Association*, 29 S. C. 560 (8 S. E. Rep. 27); *Westfield v. Westfield*, 19 S. C. 85; *Keesee v. Border Grange Bank*, 77 Va. 129; *Westheimer v. Cooper*, 40 Kan. 370.

In this case the measure of damages is such as did arise, and would naturally arise, according to the usual course of things, from a breach of the contract, or such as may reasonably be supposed to have been in the contemplation of both parties when they made the contract, and as the probable result of a breach of it. 1 Suth. Dam. 75, 90, 91; *Cockburn v. Ashland L. Co.* 54 Wis. 619; *McHose v. Fulmer*, 73 Pa. St. 365; *Meade v. Rutledge*, 11 Tex. 44; *Leonard v. Beaudry*, 68 Mich. 312; *Brent v. Parker*, 23 Fla. 200; *Taft v. Tiede*, 55 Iowa, 370; *Cunningham v. Dorsey*, 6 Cal. 19; *Atkinson v. Morse*, 57 Mich. 276; *Masterton v. Mayor*, 7 Hill, 61 (42 Am. Dec. 38); *United States v. Behan*, 110 U. S. 338; *United States v. Speed*, 8 Wall. 77; *Railroad v. Howard*, 13 How. 344; *Hinckley v. Pittsburg Steel Co.*, 121 U. S. 264; *Flick v. Weatherbee*, 20 Wis. 392.

Where counsel in argument to the jury exceed the limits allowed to advocacy, the way to correct the objectionable effect of the argument is through an objection to it at the time. *Learned v. Hall*, 133 Mass. 417; *Rudolph v. Landwerlen*, 92 Ind. 34; *Powers v. Mitchell*, 77 Me. 361; *Dowdell v. Wilcox*, 64 Iowa, 721; *Worley v. Moore*, 97 Ind. 15; *Carter v. Carter*, 101 Ind. 451; *McLain v. State*, 18 Neb. 154; *Bradshaw v. State*, 17 Neb. 147; *State v. Anderson*, 10 Or. 448; *State v. Abrams*, 11 Or. 169; *Com. v. Scott*, 123 Mass. 236; 9 Crim. Law Mag. 743, 760–2.

The opinion of the court was delivered by

SCOTT, J.—This action was brought in the district court of the third judicial district of Washington Territory, holding terms at Mt. Vernon, by the appellee against the appellant, to recover damages in the sum of \$7,575 for an alleged breach of a contract entered into between the appellant and appellee, by which the appellant let to the appellee, for certain terms of years mentioned in said contract, certain lands therein described, and, in consideration of the sum of \$1.50 per thousand feet stumpage, sold and gave him license to cut saw-logs, piles and spars upon said lands during said time; and further agreed to furnish to said appellee, at the reasonable market price, all the provisions and logging supplies needed by him during the continuance of said contract. The appellee claimed that he entered upon the performance of his part of the contract, and employed a large number of men, purchased a large number of teams, and invested a large amount of money in camp equipage, tools, etc., and in every respect fulfilled all the conditions of the contract on his part; but that during the months of July and August and the first part of September, 1888, the appellant refused to furnish him logging supplies and provisions, as provided in the contract, and that in consequence of such failure the appellee made thirteen

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trips from his logging camp to the place of business of the appellant, at an expense of \$195, for the purpose of procuring such supplies, but in consequence of the appellant's failure to furnish them, these trips were made useless; and claimed further that during this period, in consequence of appellant's failure to furnish such supplies, the business of the appellee was interrupted, and his teams compelled to remain idle, to his damage in the sum of \$450. The appellee claimed further that the appellant failed and refused to supply him with provisions and logging appliances, as provided in said contract from the 12th day of September, 1888, for a period of six weeks continuously, and that in consequence of such failure the appellee was unable to carry on his business, and was compelled to shut down his camp and suspend his business for a period of six weeks, causing him loss and damage to the amount of \$2,000. He claimed further that on the 5th day of June, 1889, at the most advantageous time for logging, the appellant again refused to supply him with provisions and logging appliances as provided in the contract, and notified him it would no longer comply with the terms of its contract, and has ever since failed and refused to do so, and in consequence of such failure the men employed by the appellee abandoned their labors in the camp, and the appellee was unable to procure supplies or subsistence, or to maintain or operate his business to the extent of his ability, and, in place of 45,000 feet of saw-logs per day, which he had been putting into the market, was only able to put in 20,000 feet per day, causing him damage to the extent of \$3,000. The appellant joined issue with the appellee upon all the material allegations of the complaint except that of the making of the contract, and the allegation that in the month of June, 1889, it refused to furnish the appellee with supplies and so notified him. The appellant then pleaded in justification of its refusal to furnish supplies to

the appellee in June, 1889, two affirmative defenses, setting up in the first defense breach of the contract by the appellee, and in the second defense breach of a subsequent contract entered into between them for the securing of certain acceptances to be made by the appellant of certain orders by the appellee. The appellee joined issues with the appellant upon these defenses. The case was called for trial at Mt. Vernon on December 9, 1889, in the superior court of Skagit county, which had convened December 2d. The trial occupied several days, and resulted in a verdict and judgment in favor of appellee for the sum of \$3,067.50.

The first ground of error claimed by appellant is, that the superior court abused its discretion in refusing to grant a continuance of the cause. Appellant's motion for a continuance was made December 10th, while the trial was in progress, and was based upon the ground that one of its attorneys, Mr. Haller, was not present. Affidavits were filed in support of the motion showing that appellant had made every exertion to have Mr. Haller present; that a few days prior to the convening of said court he had left upon a hunting trip in company with two other gentlemen, none of whom had been definitely heard from for several days, but that it was rumored he, with the others, had been drowned, and the gravest apprehensions were entertained that said rumors were true; that Mr. Haller was the principal attorney for appellant in said matter, and the one upon whom it relied to conduct its defense. (It was subsequently learned that Mr. Haller had, in fact, lost his life as reported.) Counter-affidavits were filed by appellee to the effect that Mr. Haller had said that he would not participate in the trial in consequence of a claim made by appellee that he had counseled with him previous to the commencement of said action as to the matters then in controversy therein; also that on said December 2d ap-

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appellee notified Mr. Burke, of the firm of Burke & Haller, that said court was in session and that he intended to have said cause called for trial. The first attorneys who appeared for appellant in the action were Cushing & Dunning, who filed a demurrer to the complaint September 20, 1889. Mr. Cushing was appellant's secretary. On November 23d following, Cushing & Dunning and Burke & Haller filed an answer in the case for appellant, a reply was filed by appellee, and the cause was at issue before the court convened. On December 5th appellant employed Hon. C. H. Hanford, Rochester, Lewis & Gilman and E. C. Million as attorneys for it in said action, and on December 6th C. E. Patterson was also employed as one of its attorneys therein. It appears that the case was called several times during the first week of the session, and was passed at appellant's request, the last time on December 6th, upon a motion by appellant for a continuance to the first of the following week, which motion was granted, with the understanding that it would be the first civil cause called for trial. No exception was taken to this, appellant then expecting to have Mr. Haller present before said time had expired. It appears that appellant acted in entire good faith in the premises and made great exertions to learn where Mr. Haller was, and also insisted upon its right to have him heard if possible as to the matters stated in appellee's affidavits relating to his intended participation in the trial. Upon Monday of the following week (December 9th) the case was called and the parties proceeded to trial. No objection was made thereto by appellant, nor did it then apply for a further continuance. It now contends that it was understood when the trial was commenced that it would take several days within which to complete it, and that appellant expected Mr. Haller would arrive before any material progress had been made therein up to

December 10th, when the rumors of his drowning became rife, and its said motion for a continuance was made.

The second ground of error alleged is in regard to the refusal of the court to permit the appellant to amend its answer, except in one instance on the condition that it pay the costs accrued, and in the other refusing it entirely. It appears that when the trial was commenced appellant asked and obtained leave to amend the answer in several minor matters. Two subsequent applications to amend were made by it. We are unable to gather from the record what the nature of the amendment was that was asked for in the first of the subsequent applications, but it appears to have been granted with the requirement that appellant should first pay the costs accrued. Appellant refused to accede to the terms, and excepted to that part of the ruling imposing them. Its last motion to amend was founded on § 109 of the code, and was made after appellee had rested his case. The amended answer itself, which was then tendered, is not to be found in the record; but it appears by the affidavits which were filed in support of the motion therefor that the purpose was to set up another defense, to the effect that appellant was prevented in the summer of 1888 from furnishing the supplies it had contracted to furnish appellee by reason of the extreme and unusual lowness of the water in the Skagit river during said time, so that the same could not be navigated, and that there was no other way of getting such supplies to appellant's store; that its attorneys who were engaged in the trial only knew of this matter a day or two before the commencement thereof; and that they had supposed up to the time of entering on the defense that the court would permit the proof under the general denial pleaded. Appellee filed affidavits denying any cessation in the navigation of said river during said time, and claimed he could

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prove that the same was navigable throughout said season, but that in order for him to do so it would be necessary to have the cause continued so that he could procure the attendance or testimony of witnesses from a distance, and that it would be a great hardship to him if the amendment should be permitted. The court, in considering the motion, said if it was granted it would necessitate a continuance; that appellant had had an opportunity to amend under terms and refused to do so, and he would deny the motion; to which appellant excepted.

All of the foregoing alleged errors are in relation to matters which are addressed to the discretion of courts of original jurisdiction, and in some of the states and in the United States courts, are regarded as so peculiarly fit for the decision of such courts only that the granting or refusing thereof constitutes no ground for an appeal. *Wright v. Hollingsworth*, 1 Pet. 165; *Henry v. Cannon*, 86 N. C. 24; *Westfield v. Westfield*, 19 S. C. 85. Another practice obtains in many of the states, however, and which we think is the better one, of holding them appealable in so far as to correct an abuse of such discretion. But such abuse must be clearly apparent before an appellate court would be justified in reversing a judgment upon such grounds. Considering all the circumstances connected therewith in this case, we cannot say that the action of the lower court in the premises was erroneous or unreasonable.

Another ground of error complained of is as to the allowance of testimony and recovery of damages for the several trips made by appellee from his logging camp to appellant's store for the purpose of procuring supplies, which trips, he claimed, resulted in failures. Appellant contends that damages could not be recovered for more than one of said trips. Appellee testified that the reason he did not get the supplies upon such occasions was because appellant did not have the goods on hand, but in-

formed him the same were constantly expected, and requested him to come at stated times therefor, and that appellant was disappointed from time to time in getting the expected shipment; that upon some of said trips he got a small portion of the supplies he went after, but that he did not get what he needed, and it was claimed such trips were practically failures. Numerous special findings were made by the jury, from which it appears that but two trips were made upon which no supplies were obtained. The jury allowed damages for eight trips in the sum of \$90, as follows: For two, \$15 each; and for six, \$10 each. No allowance was made for the others claimed to have been made. There having been testimony to show that the trips were made with a reasonable expectation of getting the supplies needed, based upon the information furnished by the appellant, it follows that the fault, if fault there was, cannot be held to have been that of the appellee, and there was no error in this respect.

A further point is urged, that the court erred in permitting appellee to introduce testimony as to his inability to procure the needed supplies elsewhere, on the ground that it was inadmissible under the complaint, it not having been alleged therein that appellee attempted to get such supplies from other sources, and that the only allegation in relation thereto was that he could not procure and pay for the supplies elsewhere. Appellant contends the statement that appellee could not procure and pay for the supplies elsewhere cannot be treated as an allegation that he could not procure them, and this of course is true; but the complaint does allege that the appellee was prevented from carrying on his business by reason of the appellant's failure to furnish the supplies it had contracted to furnish him. While the complaint is somewhat faulty in this particular, it seems to us the appellant was apprised by it that proof of this character was to be offered, and that it did not



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result in any surprise or injury. It may be fairly understood from the statement—that the appellee was thereby prevented from carrying on his business—that he attempted to procure the supplies from other parties and failed to get them, as that would be the ordinary way of proving such an allegation; and we do not think there was any substantial error here.

Appellant's main contention, however, is as to the damages, if any, appellee was entitled to recover, and this is the most important question in the case. The appellee claimed he should be allowed to recover as damages the value of the logs he could have put in the market during the time after September 12, 1888, when he was compelled to shut down in consequence of appellant's failure to furnish the supplies, less the cost of getting out and handling such logs, and also the value of the logs he could have put in the market in July and August and the first part of September, 1888, and after June 5, 1889, with the full force which he could have operated during said times had the supplies been furnished as contracted, over and above what he did put in with the diminished force, less the cost of getting out and handling such excess. Appellant contends that such damages or profits were too remote, conjectural and uncertain to be estimated; that the same depended upon the continuing ability of the men and teams engaged to perform the same amount of labor; that the weather should remain the same and the market price unchanged; that such damages could be allowed, if at all, only in those cases where there was a stipulation in the contract that the other party should take the proceeds of such labor for a price certain, or where the disposition thereof was provided for by a collateral contract of which the other party had knowledge at the time of entering into the original contract, or where the thing contracted for was to be furnished for a particular purpose, and so understood; and that in the present case

the measure of damages could only be the increased price and extra expense, if any, in procuring the supplies in the market; that the contract provided for nothing more, and that nothing else could be held to have been within the contemplation of the parties. The appellee claimed he had a right to show the known situation of the parties at the time of contracting; the object they had in entering therein; that he was unable to get such supplies from any other source, and that appellant knew thereof when contracting with him. Appellant objected to such testimony upon the grounds that there was no allegation in the complaint that appellant knew appellee could not procure the supplies elsewhere; that the contract itself was the best evidence of what the parties contemplated; and for the reason that it was immaterial. The court allowed the testimony, from which it appeared that appellant was engaged in the mercantile business on the Skagit river; that it was carrying an extensive stock of merchandise, and owned large areas of timber land bordering on said river; that a part of its business was to make money out of its timber, and from its store in furnishing supplies to persons engaged in cutting and hauling timber, and to this end appellant sought to create a market and a demand for its timber and the merchandise; that appellee was an experienced logger, and made logging his business, but that he was financially unable to undertake logging on an extensive scale, and would have to be carried in an undertaking like the present one; that this was known and contemplated by both parties in entering into the contract. The contract itself provided that the supplies should be furnished upon credit, and that appellant should have a preference lien on all the logs and timber cut to secure it for the amounts that should be due for stumpage and supplies, and it bound the appellee to purchase all of his supplies from the appellant during the continuance of the contract, and provided that such indebtedness should be paid out of the proceeds


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of such logs and timber by the purchasers at the time of purchase. An *addendum* to the contract provided that after appellee should pay all indebtedness to appellant, and wished to purchase goods for cash, appellant would sell him goods for cash as cheaply as he could purchase elsewhere, and, in case appellant refused to do so, appellee should then be at liberty to purchase in the open market. There was testimony to show that the logs and timber had a general market value, and what that value was; also the number of feet appellee actually got out, and the proportionate additional amount he could have gotten out during the times provided for in the contract had he been furnished with the necessary supplies as agreed upon; and testimony as to the cost of getting out and hauling the logs, and the amount of profit that would have been realized thereon. One of the instructions given by the court to the jury upon the subject of damages was substantially as follows (one paragraph relating to damage claimed by reason of a forced sale of cattle, upon which no point is made, being omitted):

“In this case, that you may arrive at a just verdict, you will consider from the evidence the situation of the parties at the time they entered into the contract as known to each other, and the object they had in entering into the same as made known one to the other, and if you find from a fair preponderance of the testimony that the defendant knew at the time it entered into the contract with the plaintiff that the plaintiff was unable to carry out the terms of his contract unless defendant would supply him the provisions and supplies needed by the plaintiff mentioned in the contract, and, so knowing, it allowed plaintiff to enter upon the land mentioned in the contract, and to construct thereon extensive logging roads and other improvements, to purchase teams, tools, etc., necessary to successfully carry on said logging business, and that plaintiff did actually construct, or cause to be constructed, extensive logging roads upon said premises, and purchased teams, tools, etc., for said purpose, and that the parties to

said contract entered into said contract for the purpose of making profits, and after plaintiff had expended considerable means in preparing and constructing logging roads, and placed the premises in good condition to be successfully and profitably logged, the defendant, without any legal excuse or justification, committed a breach of the contract by refusing to supply plaintiff with reasonable and necessary supplies to carry on said business, and that plaintiff was prevented thereby from continuing his business, or that his business was run in a reduced state, so that he was prevented from producing the same quantity of logs that he had under the same circumstances produced immediately prior to the time the defendant refused to furnish the supplies, if you find it did refuse so to do, without any legal excuse or justification, then I instruct you that the measure of damages in this case is the value, at plaintiff's camp in Skagit county, of that quantity of logs which represents the difference between what plaintiff would have produced had the defendant furnished all necessary supplies as alleged and claimed by the plaintiff and the amount of logs actually produced by said plaintiff, besides such special damage, if any, plaintiff sustained by reason of certain alleged trips he made for supplies. The jury will estimate the number of days, if any, which plaintiff's camp was shut down by reason of the alleged failure of the defendant to comply with the contract during 1888, and, having so estimated this time, the jury will estimate the value at plaintiff's camp at said time of such quantity of logs, if any, which the plaintiff would have produced at plaintiff's landing during the time that plaintiff was so compelled to shut down; and if you find that plaintiff was compelled by reason of the alleged breach of contract by the defendant to operate and run his camp, during any time in 1889, upon a reduced or diminished scale from that which he would have operated and run the same had such alleged breach not occurred, the jury will then estimate the time during which the camp was operated by the plaintiff upon said reduced scale. And I charge you that, if you find by a preponderance of the evidence that the plaintiff has been damaged at this last mentioned time by reason of the alleged breach of contract on the



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part of defendant, that you will arrive at the measure of damages as follows: Having found the time he was compelled to operate said camp on a diminished scale, you will then find the quantity of logs, if any, which plaintiff would have produced at his landing had said alleged default in said contract not occurred, and from this quantity so ascertained by you you will deduct the quantity of logs actually produced at said place by defendant during the time he was so compelled to operate upon said reduced scale, and the value at the plaintiff's landing in said county of the difference between these two quantities thus ascertained will be the measure of damages which the plaintiff sustained by reason of said breach of said contract, if any he did sustain."

In addition to its other objections as to the measure of damages, appellant argues that this instruction was erroneous upon two other grounds—*first*, that it, in effect, allowed appellee to recover pay twice for his time in making futile trips for supplies; in also allowing him pay for what he could have done in the way of getting out logs during said time had the supplies been furnished and the trips not have been made; *second*, that the jury was not instructed to deduct the cost of producing the excess which it was claimed could have been gotten out but for the fault of appellant, from the value of such excess. As appellant did not assign the first point as error in its brief, but only called attention to it in the oral argument, and as we are not entirely satisfied from what we have been able to gather from the record that the output of logs would have been necessarily diminished by the absence of the person and team engaged in making the trips, we will not disturb the verdict in the premises. The second point is disposed of by another instruction, where the court told the jury that the cost of getting out the excess should be deducted, and by the fact that the jury did deduct the cost thereof from the value of such logs, as appears by their special findings.

As to the inadmissibility of the evidence objected to

under the pleadings, while the complaint did not contain a direct allegation that appellant knew the appellee was unable to procure supplies elsewhere, it did contain the following statement:

“That, at the time of purchasing said timber from the said defendant as aforesaid, plaintiff, for want of sufficient means, was unable to employ and pay a requisite number of men and to purchase the extra number of teams and tools necessary for plaintiff to have to enter upon said described premises and to make logging roads thereon so as to transport said timber to market, and to purchase a sufficient supply of goods, wares, and merchandise to enable plaintiff to carry on so extensive a logging business and remove said timber from said described premises during the limited period aforesaid; and in order to induce the said plaintiff to purchase said timber from the said defendant, and to induce the said plaintiff to remove the said timber from the said premises aforesaid within the respective periods of time aforesaid, and in consideration of the said plaintiff's purchasing said timber and agreeing to remove the same within the time aforesaid, the said defendant then and there contracted and agreed to and with the said plaintiff to furnish plaintiff with the means with which to employ and pay men, purchase teams, tools, etc., to properly conduct and carry on said business, and to sell, furnish and deliver to said plaintiff all the provisions and logging supplies needed by said plaintiff upon credit.”

There was testimony also to show that the parties had transacted business with each other before entering into this contract, and appellant's vice-president testified that at the time the contract was made appellant knew Cole had no money, and that it would have to back him in the enterprise, and knew he could not get along without such assistance. From all the circumstances connected with this matter, we are satisfied appellant did not sustain any injury therein.

As to the basis upon which appellee was entitled to recover damages, a long list of authorities was presented by

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each party, which it is difficult, if not impossible, to harmonize. The position taken by appellee and sanctioned by the superior court is sustained by a number of cases very similar to this one. If the appellant, when it entered into this contract, knew that the appellee was unable to obtain these supplies elsewhere, and that he could not carry on the undertaking without its assistance, and knew when it ceased furnishing the same that the result would be to compel appellee to abandon the enterprise, or to seriously embarrass him in the further execution thereof, it must be held to have contemplated the direct and presumable results of its own wrongful act, and to be answerable in damages therefor. Nor do we think the damages too uncertain or conjectural to be estimated, within the trend of the better authorities. The trees were there from which the logs, spars and piles could be manufactured; and at the time of the breaches there was the benefit of past experience—the known results of previous efforts in carrying on the work—from which to form an estimate of what could have been done thereafter had the supplies been furnished. The timber itself when gotten out was a staple commodity, with a market value not subject to any sudden or great fluctuation, and this value was easily susceptible of proof. Indeed, some of the cases go to a much greater extent than it is necessary to go in this case to sustain the rule of damages adopted at the trial. Of the authorities presented upon the question of damages we cite the following as supporting this case: *Shepard v. Gaslight Co.*, 15 Wis. 349; *Booth v. Rolling Mill Co.*, 60 N. Y. 487; *Richardson v. Chynoweth*, 26 Wis. 656; *Hammer v. Schoenfelder*, 47 Wis. 455 (2 N. W. Rep. 1129); *Crescent Mfg. Co. v. N. O. Nelson Mfg. Co.*, 100 Mo. 325 (13 S. W. Rep. 503); *Houser v. Pearce*, 13 Kan. 104; *Benj. Sales*, § 870; 1 Suth. Dam., pp. 75, 90, 91, 106–116.

A further error is claimed, that counsel for appellee prejudiced the jury against appellant by repeatedly apply-

ing harsh and opprobrious epithets to it in his closing argument, which abusive language it is claimed was in no wise warranted by the evidence. It seems that no objection was made thereto at the immediate time, but at the close of the argument appellant excepted to the court's permitting said statements to be made, whereupon the court immediately said to the jury that the language was uncalled for, and should under no circumstances affect them or the case, and subsequently reiterated the same in his instructions. Appellant urges that it is the court's duty to supervise the making of an argument, and that it should in this case of its own motion have prevented counsel from repeating the statements complained of without an objection by appellant; that it is not the correct practice for counsel to interrupt another at such a time. Appellee insists that all he did say was fully justified and called for by the testimony, notwithstanding the court's remarks to the contrary to the jury, and, if it was not, that it was waived by a failure to object at the time. In the view we take of the matter, it is not necessary to set forth the statements or to examine the evidence to see whether the same were excusable. Some latitude must be allowed counsel in arguing to the jury. However, the court should, without an objection, prevent counsel from clearly transgressing all reasonable limits therein; yet, as here, where the statements were made under an apparent *bona fide* belief that they were permissible under the proof, if appellant desired to prevent a repetition or continuation thereof it should at least once have called the court's attention thereto by an objection during the argument, otherwise it must be content with the action of the court, when the objection was made, in its doing all it could to prevent the language from having an adverse effect to appellant upon the jury. Judgment affirmed.

ANDERS, C. J., and DUNBAR and STILES, JJ., concur.



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HOYT, J. (*dissenting*). — I am unable to agree with the conclusions of the majority of the court as to most of the questions presented by this record; but, as no good purpose would be subserved by an extended discussion of the reasons which control my judgment, I shall content myself with a brief review of two of the many points presented.

*First:* As to the ruling on defendant's motion for a continuance. On the 10th day of December, 1889, defendant filed the affidavit of its secretary, substantially as follows:

"Eugene B. Cushing, being first duly sworn, deposes and says that he is the secretary of the defendant corporation, and, as such officer, is familiar with the business of said corporation; that at the time of the bringing of the above entitled action he retained G. Morris Haller to defend said corporation, with the understanding that he was to have the sole and exclusive conduct and management of this suit, and was to prepare all the pleadings, investigate the testimony, and in every way to prepare the defense to said suit; that upon the settlement of the pleadings plaintiff's counsel objected to the appearance of Mr. Haller in this case on the ground that he had expressed some opinion with relation to some paper or document involved in this suit; that upon a full consultation between Mr. Haller and Judge Burke, his partner, and this affiant, it was decided that there was nothing whatever that could or should in any way prevent Mr. Haller from continuing in the case for the defense, and he then and there promised this affiant that he would do so; and since that time, to wit, about the 10th of November last, affiant again saw Mr. Haller and told him that if there was any doubt about his being able to try this case to be sure to let affiant know so that he could secure other counsel; and that then and there Mr. Haller assured affiant that he need have no anxiety about the matter, for he should attend promptly to the case and in every way care for the interests of the defendant corporation and would duly notify affiant when the case would be ready for trial, so as to enable him to have his testimony ready and the defendant's witnesses all present;

that relying upon these promises of Mr. Haller, affiant took no further steps in this matter, and that the first notice that this affiant had that the case was ready or would be called for trial at this term of this court was a telegram which he received from Mr. V. A. Marshall on last Thursday night, December 5, 1889, announcing that this case was set for trial and that Mr. Haller was not present; that thereupon affiant telegraphed Mr. Haller to know if he was attending to the case, and received an answer from Judge Thomas Burke, his partner, that he was absent from home and he could not state where he was or when he would return; that thereupon affiant telegraphed Judge Burke that the defendant was taken wholly and completely by surprise and was in no manner prepared for trial, and asked him to telegraph the court at Mt. Vernon explaining the facts, and to ask a continuance until such time as the defendant could get ready and proceed to trial with safety; that thereafter affiant received a telegram from V. A. Marshall on the night of Saturday, December 7, 1889, saying that the court would not grant a continuance and for affiant to come to Mt. Vernon immediately; that thereupon affiant took the first possible conveyance and arrived at Mt. Vernon Monday afternoon, December 9, 1889, after the trial of this case had commenced; that affiant is credibly informed that G. Morris Haller, aforesaid, started upon a hunting trip about two weeks ago with the avowed intention of returning in a few days, and of being present at this term of the court to attend to such cases as he was counsel in, and affiant is further credibly informed that the friends of Mr. Haller are now greatly alarmed about his safety and express great fears that he may have lost his life, as his long absence and continued silence are so much at variance with his expressed determination to return in a few days. Affiant further states that the defendant has made no preparation whatever for the trial of this cause, having relied wholly upon Mr. Haller to inform it when to take the necessary steps, which information it has never received; and affiant states that to be compelled to continue the trial of this cause at the present time would be unjust and oppressive, and work irreparable injury and hardships to defendant. Affiant further states

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that defendant should be given a reasonable time in which to acquaint counsel with the facts in this case, which involves a long period of time, to wit, about four years, and the investigation of long and complicated accounts, and involving a very large sum of money, to wit, more than fifteen thousand dollars. And affiant further states that, at the time he retained the said G. Morris Haller, he, the said affiant, made a full, true and complete statement of the facts constituting the defense in this action, and that then and there his said counsel advised him that said defendant corporation had a full and complete defense to said action, all of which said affiant did then and does now verily believe to be true. And affiant states that the defendant has in no manner been negligent in this behalf, but has used every effort and diligence to be prepared for the trial of this case when it should be called for trial."

This affidavit was corroborated by several other affidavits, and was absolutely uncontradicted, for though in the affidavits filed in opposition to the motion certain statements of said Haller and of his partner were set out, yet there was absolutely no proof that the intentions of said Haller or Burke, as stated by them, had ever been in any way communicated to any of the officers or agents of said defendant. After examining all of the affidavits filed I have been unable to find that there was any substantial dispute as to the facts stated in the affidavit above set forth. This affidavit was supported by those of all the attorneys of said defendant present at the trial, to the effect that they were not prepared to try the case, and that the rights of the defendant could only be protected by a continuance of the cause. In addition to the above it appeared, before the question of continuance was finally disposed of, that the said Haller had been drowned on or about December 2d. On this showing I think that the motion for continuance should have been granted. The object of the law and of the institution of courts is that there may be a fair trial and a right determination of all alleged causes of action,

and whenever this court is satisfied that, by the action of the lower court, a party has been deprived of the opportunity to fairly present his cause, it should order a new trial. I think the facts proven upon such motion for continuance show that without it the cause could not be fairly tried, and that therefore there should be a new trial.

*Second:* As to the rule of damages authorized by the contract as applied to the facts proven upon the trial. The conditions of the contract which bear upon this question are vague and indefinite, and it might well be held thereunder that no breach could be assigned thereon. There was an absolute want of the usual conditions of exactness and certainty. The agreement simply provided on the one part that supplies should be furnished, and on the other part that they should be accepted and paid for, but as to the amount of such supplies, or the time when or place where they should be thus furnished and accepted, the contract was entirely silent. If these conditions could be enforced at all they must be mutual. Now, suppose the plaintiff had made up his mind not to take the supplies of the defendant, and the defendant had decided to bring an action to compel such taking or to recover damages, could it maintain such action? If it could not, then it must follow that the plaintiff could not successfully allege a breach of such conditions. It is not necessary for the purpose of this discussion that I should come to a conclusion as to the above inquiry, as from my interpretation of the contract the measure of damages adopted by the lower court was wrong, even if the contract was held to be sufficiently certain to support an action for the breach thereof. There was nothing in the contract or in the proof at the trial to show that any of the supplies contemplated by the contract could not be obtained in the open market, and therefore the general rule as to damages would be the difference between the contract price and the price in the open mar-

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ket; and, there being in this case no contract price other than the market price, there could be no damage.

It is claimed, however, that the contract, when viewed in the light of the circumstances surrounding the parties at the time it was entered into, as disclosed by the proof, shows that the parties clearly contemplated other than the usual responsibility in regard to such furnishing of supplies by the defendant. I am unable to see that this claim has any foundation, as the plain conditions of the contract show that the agreement to furnish and take the supplies in question was mutual, and that the defendant was as much moved to enter into the contract by the agreement of the plaintiff to get his supplies of it as the plaintiff was by its agreement to furnish the same. But if it is conceded that said contract was all that the plaintiff claimed, and that thereunder the defendant became an absolute warrantor that such supplies would be furnished as stated therein, yet the measure of damages adopted seems to me to be wrong. The defendant had no control over the magnitude of the operations of the plaintiff, and had not contracted to supply any particular grade or kind of camp; and the simple fact that the plaintiff had established his enterprise upon a particular scale would no more compel the defendant to supply that particular scale than any other; and if the rule of damages laid down in this case is sustained, the plaintiff could have doubled the amount of his recovery by having instituted his enterprise on a scale as large again as he did. If the defendant was liable for the loss of prospective profits growing out of the reduction of his force from forty to twenty men, he would have been likewise liable if the force had been reduced from eighty to ten men. It seems to me impossible that the parties could have contemplated such a construction of the contract that the damages for a breach thereof could thus be increased or decreased at the will of one party without the act or consent of the other.

I shall not attempt to review the cases cited by the majority of the court more than to say that I have carefully examined them all, and I do not think any of them sustain the doctrine approved in this case. If the contract as to supplies was enforceable at all, the highest measure of damages that could be sustained, upon any theory of the case, would be the actual loss suffered by reason of a breach thereof; and of this actual loss prospective profits could form no part. Such actual loss would, in ordinary cases, be the difference between what the supplies were to be furnished at and what it cost to procure them elsewhere. But if it appeared that it was known to the parties that it would be impossible for the plaintiff to get the supplies elsewhere by reason of want of money or credit, and in the light of such knowledge the defendant supplied plaintiff and allowed him to incur large expense by way of making roads, etc., in anticipation of getting in logs under the contract, and then, knowing these facts, refused to supply him longer, defendant should, for such refusal, be held liable to plaintiff for the money thus expended by him in the prosecution of the enterprise, less any sums he had received on account thereof. Even if the rule of damages approved by the majority of the court is correct upon the facts found, it could not avail plaintiff, for the reason that the complaint is insufficient to authorize the introduction of proof as to the knowledge of defendant of the condition of plaintiff. In my opinion the judgment should be reversed, and a new trial ordered.

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Argument of Counsel.

[No. 64. Decided February 11, 1891.]

EBEN PIERCE v. JAMES A. FRACE.

PUBLIC LANDS—PRE-EMPTION—CANCELLATION OF ENTRY—EJECTMENT.

Under the laws of this state the holder of a final receipt for entry upon public lands, which is in force and uncanceled, may maintain an action of ejectment to protect his possession thereunder.

Until the issuance of patent for an entry under the pre-emption laws of the United States, the commissioner of the general land office may suspend the entry, and order a re-examination as to the pre-emption claimant's residence upon and improvement of the land for which he holds the final receipt of the register and receiver, and if, on said re-examination, it is shown that the claimant has not complied with the law, the commissioner of the general land office has power to cancel the entry. (DUNBAR, J., dissents.)

*Error to Superior Court, Pierce County.*

The facts are fully stated in the opinion.

*Doolittle, Pritchard & Stevens*, for plaintiff in error.

It seems plain, upon a fair construction of the United States Statutes—(1) That the register and receiver have been constituted by law the tribunal to hear and determine all questions relating to the settlement and improvement of pre-emption claims, and there is no reservation of power upon these questions to any of the higher officers of the land department, and the only restriction upon the power and authority of the register and receiver is, that they shall hear and determine these questions agreeably to such rules as may be prescribed by the secretary of the interior. Rev. St. U. S., § 2263.

(2) That there is no appeal from this decision of the register and receiver upon these questions except in cases where questions arise between different settlers upon the same land, which questions are to be determined by the

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register and receiver, and then the appeal lies from such decision to the commissioner of the general land office, and from him to the secretary of the interior. Rev. St. U. S., § 2273; *Wilcox v. Jackson*, 13 Pet. 498-511; *Lytle v. Arkansas*, 9 How. 314-328.

In the matter of sales of public land, the courts have viewed the transaction precisely like that of a sale between two private individuals. The government is regarded as a vendor and the pre-emptor as a purchaser, and when the contract has been completely executed by the payment of the full amount of the purchase price, it has been universally held that a vested right existed in favor of the pre-emptor, and that the contract had assumed such a character that it could not be rescinded arbitrarily by the government. *Carroll v. Safford*, 3 How. 441-460.

In some of the earlier cases, the supreme court seems to have attached paramount importance to the fact that the *legal title* remains in the United States until the execution and delivery of the patent, but the later and better doctrine is that although the naked legal title may be held to technically remain vested in the United States until the execution and delivery of the patent, yet upon the consummation of the sale, and its complete execution by the payment of the purchase price on the one hand and the delivery of the final receipt or patent certificate on the other, a complete equitable title vests in the purchaser, which is substantially equivalent to the patent, and which is sufficient to overcome a patent which may have been subsequently issued to another claimant. *Witherspoon v. Duncan*, 4 Wall. 210; *Simmons v. Wagner*, 101 U. S. 260; *Cornelius v. Kessel*, 128 U. S. 457; *Smith v. Ewing*, 11 Sawy. 56 (23 Fed. Rep. 741); *Wilson v. Fine*, 40 Fed. Rep. 52.

The courts are bound, of course, and it is their province to set aside any judgment or decision or any contract founded upon fraud, and we think the decision of Judge



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Argument of Counsel.

DEADY is correct, that the executive officers of the government should not be allowed, in any case, unless clearly authorized by statute, to annul or set aside vested rights, but that the government should be required, like an individual under like circumstances, to resort to the courts to have a judicial determination of questions of this character. *Camp v. Smith*, 2 Minn. 155.

As fully sustaining the position we contend for, at least to the extent required for the purposes of the case at bar, we cite the following additional authorities: *Perry v. O'Hanlon*, 11 Mo. 585 (49 Am. Dec. 100); *Brill v. Stiles*, 35 Ill. 309 (85 Am. Dec. 364); *Cady v. Eighmey*, 54 Iowa, 615; *Arnold v. Grimes*, 2 Iowa, 1; *Sillyman v. King*, 36 Iowa, 207; *Moyer v. McCullough*, 1 Ind. 339; *Aldrich v. Aldrich*, 37 Ill. 32; *Morton v. Blankenship*, 5 Mo. 346; *O'Brien v. Perry*, 28 Mo. 500; *Cornelius v. Kessel*, 58 Wis. 237; *Boyce v. Danz*, 29 Mich. 146; *Streeter v. Rolph*, 13 Neb. 388; *Baty v. Sale*, 43 Ill. 354 (92 Am. Dec. 128).

The statutes of the United States provide for contests in homestead cases, in timber culture cases, in mineral land cases, in desert land cases and in pre-emption cases. The only contest provided for in pre-emption cases is under § 2273 of the revised statutes, and it is there provided that these contests as to pre-emption claims must be between two or more persons, who have settled on the same tract of land. No mere stranger can initiate a contest, and the land department itself seems to have so considered the law, when the question has been brought before it, at least until very recently. *Kort v. Helton*, Dec. Sec'y Interior, Jan. 15, 1881; *Milam v. Farrow*, 8 Copp's Land Owner, 93.

Under the old rule which prevailed in ejectment cases, of course the plaintiff could not recover in this form of action upon an equitable title, and hence it was necessary for him to exhibit a patent in support of his chain of title in order to make out the legal title, which was required of him; but

under our statute (code 1881, § 538) this rule has been changed, and our right to maintain the action upon the equitable title, which we maintain is fully supported by the authorities heretofore cited; indeed, many of the cases cited by the defendant fully support us in this position. *Marquez v. Frisbie*, 101 U. S. 473; *Dickinson v. Brown*, 9 Smedes & M. 130; *Simmons v. Wagner*, 101 U. S. 260.

*Judson, Sharpstein & Sullivan*, for defendant in error.

The provisions of the Revised Statutes of the United States (§§ 158, 441, 453, 456, 458, 459, 2478, 2257-63) indicate clearly that when a person has complied with the conditions prescribed by law that he is to make proof of this fact to the satisfaction of the register and receiver in the first instance, but that their conclusion is not final but subject to the supervision of the commissioner of the general land office. The determination of the commissioner is judicial in its character. If he decides that the patent should issue he prepares the patent for execution, and thereupon it is signed by the president and countersigned by the recorder of the general land office and recorded. When this last act is completed, and not till then, the authority of the land department over the land named in the patent ceases. The patent is the only evidence of title which is authorized by Congress. The very essence of sovereignty lies in its non-liability to be sued. And the fact that the decisions from which we shall presently quote deny the rights of the courts to compel the commissioner of the general land office to issue a patent, necessarily determines as matter of law that the land department has the exclusive jurisdiction of the public lands and of their control and disposition. *Bagnell v. Broderick*, 13 Pet. 436; *Wilcox v. Jackson*, 13 Pet. 498; *United States v. Commissioner*, 5 Wall. 563; *Gaines v. Thompson*, 7 Wall. 347; *Hosmer v. Wallace*, 47 Cal. 461 (affirmed in 97 U. S. 575); *United*

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*States v. Jones*, 131 U. S. 1; *Marquez v. Frisbie*, 101 U. S. 473; *Litchfield v. Register and Receiver*, 9 Wall. 575; *Secretary v. McGarrahan*, 9 Wall. 298; *Dickinson v. Brown*, 9 Smedes & M. 130; *Hays v. Parker*, 2 Wash. T. 198.

We assert as a proposition of law: That until the issuance of patent the commissioner of the general land office may suspend an entry and place the pre-emption claimant in the same position that he was prior to the offering of proof; and that on said second hearing the government can itself, through its officers and agents, or by the efforts of an informer, re-examine the question as to the pre-emption claimant's compliance with the law, and if on said hearing it is shown that the claimant has not complied with the law, that the commissioner of the general land office may cancel the entry and allow any person to file a declaratory statement for the same, and, after compliance with the law, permit him to enter it. *Frisbie v. Whitney*, 9 Wall. 187; *Harkness v. Underhill*, 1 Black, 316; *Barnard's Heirs v. Ashley's Heirs*, 18 How. 43; *Hestres v. Brennan*, 50 Cal. 211; *Randall v. Edert*, 7 Minn. 450; *Gray v. Stockton*, 8 Minn. 529; *Judd v. Randall*, 36 Minn. 12 (29 N. W. Rep. 589); *Darcy v. McCarthy*, 35 Kan. 722 (12 Pac. Rep. 104); *Morton v. Green*, 2 Neb. 441; *Forbes v. Driscoll*, Dak. Feb. 1887 (31 N. W. Rep. 633); *Bellows v. Todd*, 34 Iowa, 18; *Gray v. McCance*, 14 Ill. 343; *McLane v. Bovee*, 35 Wis. 27; *Figg v. Hensley*, 52 Cal. 299; *Shepley v. Cowan*, 91 U. S. 330; *Moore v. Robbins*, 96 U. S. 530; *Quinby v. Conlan*, 104 U. S. 420; *United States v. Minor*, 114 U. S. 233; *Lee v. Johnson*, 116 U. S. 48; *Porter v. Bishop*, Fla. Dec. 1889 (6 So. Rep. 863); *United States v. King*, 9 Mont. 75 (22 Pac. Rep. 498); *Vantongerren v. Heffernan*, 5 Dak. 180 (38 N. W. Rep. 52-97).

The opinion of the court was delivered by

HOYT, J.—Plaintiff in error filed his complaint in eject-

ment and sought to recover possession of certain land therein described. Defendant in error answered, denying the allegations of the complaint and alleging as an equitable defense facts substantially as follows :

On December 20, 1880, the plaintiff in error filed his declaratory statement for the premises in controversy under the pre-emption laws of the United States. On February 13, 1883, he made final proof to the satisfaction of the register and receiver of the United States land office at Olympia, and on March 12, 1883, his cash entry was allowed by the register and receiver and a final receipt issued to him; that on August 7, 1883, and while the final proof of plaintiff in error was in the hands of the commissioner of the general land office, defendant in error filed with said commissioner his corroborated affidavit in which he alleged that plaintiff in error "had at no time established his residence on said land, and that he had failed to improve and cultivate the same as required by law, and that the said cash entry had been procured by fraud." The commissioner, on the 16th day of May, 1885, suspended the entry and ordered a hearing to be had before the register and receiver, touching the charges made by defendant in error in said affidavits. On July 13, 1885, said hearing was had, at which plaintiff in error appeared with his witnesses, as did also the defendant in error. The evidence was taken, and after argument the register and receiver found that plaintiff in error "at no time established his residence on the land embraced in his said cash entry; that he failed to cultivate and improve said land as required by law;" and they, therefore, advised that said cash entry be canceled. Plaintiff in error thereupon took an appeal from the decision of the register and receiver to the commissioner of the general land office, and on June 3, 1886, the commissioner affirmed said decision and ordered plaintiff in error's cash entry to be canceled. Again plaintiff in error took an appeal, this time to the secretary of the interior, and on March 31, 1888, the secretary affirmed the decision of the commissioner of the general land office, and thereafter canceled said plaintiff's cash entry. Subsequently the defendant in error filed upon said premises embraced in said cash entry under the homestead laws of

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the United States, and thereafter made his final proof, and received from the register and receiver of the land office his patent certificate for said premises.

To this answer plaintiff in error filed a reply, in which he asserted that the proceedings of the land office after the 12th day of March, 1883, the date on which his certificate was issued, "were wholly void, for the reason that said officers had no jurisdiction whatever over the said land or the plaintiff in error," and denied that the defendant in error, in the affidavit filed by him with the commissioner of the general land office, alleged that the plaintiff in error failed to improve and cultivate said land as required by law, or that said entry of plaintiff in error had been procured by fraud. He further denied that the decision of the commissioner of the general land office was affirmed by the secretary of the interior, except as to the findings of the register and receiver and commissioner that plaintiff in error had not made his residence upon said land. Defendant in error demurred to this reply, and the ruling of the court sustaining said demurrer is relied upon as cause for the reversal of the judgment rendered thereon.

Upon this record two questions have been argued — (1) Had the court jurisdiction of the subject-matter of the action? (2) Had the officers of the land department jurisdiction to cancel the entry of plaintiff in error?

The first proposition is so largely dependent on the latter that it is necessary only to say that, if the final receipt was in force and uncanceled, it would under the laws of this state authorize the holder to maintain an action for the protection of his possession thereunder. The authorities cited are to the effect that the courts will not take jurisdiction to determine the title of adverse claimants to land until the land department is through with it and the legal title has passed from the government, and are not applicable to a case like the one at bar, where the right of pos-

session under the laws of the state is alone in question. It is true that the language of the court in the case of *Hays v. Parker*, 2 Wash. T. 198 (3 Pac. Rep. 901), seems to warrant the contention of defendant in error; but the language used must be interpreted in the light of the facts of the case, and, thus interpreted, is not inconsistent with the above stated conclusions; for, though that was an action of ejectment and the plaintiff relied upon a final receipt as in this case, yet it appeared that at the time the action was commenced the plaintiff was in the land office of the United States waging a contest with the defendant as to the validity of the right upon which his action was founded, and under these circumstances the court very properly refused to aid either party in so changing the situation as to affect, or have a tendency to affect, the contest then being waged in the land office. Under the second question above stated, the contention of the plaintiff in error is, that a patent certificate issued in due form, in favor of a pre-emptioner, for lands subject to entry under the pre-emption law, where no appeal is taken from the decision of the register and receiver in granting the same, cannot be set aside by the land department upon proceedings subsequently initiated by a stranger and upon the ground of failure to comply with the law in relation to settlement and improvement; while the defendant in error contends that until the issuance of the patent the commissioner of the general land office may suspend an entry, and place the pre-emption claimant in the same position that he was prior to the offering of proof, and that on said second hearing the government can itself, through its officers and agents or by the efforts of an informer, re-examine the question as to the pre-emption claimant's compliance with the law, and if on said hearing it is shown that the claimant has not done so, that the commissioner of the general land office may cancel the entry and allow another to file upon the land.

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These contentions have been elaborately argued by counsel for the respective parties, who, by their zeal and ability, have brought together and summarized nearly all the authorities upon this subject; and the labors of the court in coming to a conclusion as to these important questions have been thereby greatly facilitated. Plaintiff in error, to maintain his contention above stated, relies upon the provisions of § 2263 of the Revised Statutes of the United States, which, he claims, constitute the register and receiver a tribunal to hear and determine all questions relating to the settlement and improvement of pre-emption claims, and that in the absence of a contest there is no appeal to the higher officers of the land department; the only exception being that they shall hear and determine these questions agreeably to such rules as may be prescribed by the secretary of the interior. The language of this section is as follows: "Prior to any entries being made under and by virtue of the provisions of § 2259, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the secretary of the interior; and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void," and would seem to warrant such construction, though it might be contended that, under the power given to the secretary of the interior, he might provide by rules that the decision of these facts should, in the first instance, be only tentative, and that before such decision should become final the register and receiver should, when directed by the commissioner of the general land office, again pass upon the question, and so continue to do until their superior officers were satisfied with the correctness of their determination. This latter contention would, however, be an unnatural and forced one, and if said section stood alone, unqualified by

other provisions of the land law, we should have little trouble in coming to the conclusion that the contention of the plaintiff in error was correct.

This language, however, must be interpreted in the light of all the provisions of law relating to the disposition of public lands. Upon an investigation of these provisions, we find that the entire duty of supervising the disposal of such lands is vested in the secretary of the interior and the commissioner of the general land office; that such commissioner is the head of a bureau having in charge all matters relating to such lands; that the register and receiver are inferior officers in such bureau, who must make full report of all their proceedings to such commissioner, who is charged with the duty of seeing that a patent issues to persons entitled thereto. These provisions were in existence at the time of the enactment of the pre-emption law of 1841, in which was found the section above quoted from the Revised Statutes. Under such provisions it had been the constant practice of registers and receivers, not only to send up to the commissioner their finding of facts, but to send therewith all the proofs taken by and before them upon which such findings were based. This practice could only be justified upon the theory that such register and receiver were inferior officers to the commissioner, and their findings were subject to review by him. Viewing the language of the section in question in the light of the law and the practice thereunder existing at the time such section was enacted, we think it is not sufficient to show the intention of congress to overturn such law and practice, and by indirection take from the commissioner his powers of supervision, and transform the theretofore inferior officers of register and receiver into courts of final determination, by whose decisions, however erroneous, the government would be absolutely concluded. The responsibility of finally determining as to the conditions precedent to the issuing of



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a patent for lands of the United States could not thus indirectly be taken from one of the higher officers of the government, acting under the immediate supervision of the president, and cast upon inferior and comparatively unknown ones, exercising their powers in places remote from the seat of government.

It is true that to hold that these findings of the register and receiver may be reviewed by the commissioner, and a rehearing ordered, may work great hardship to individuals who may thus be called upon to prove facts that they had long supposed settled by the finding of such register and receiver; but these considerations can have but little weight in construing the statutes, as courts are bound to assume that the higher officers of the land department will not act arbitrarily, and causelessly put the burden of a second hearing upon an applicant. On the other hand, to hold otherwise would place the entire interests of the government, as to these important questions, in the hands of these inferior and remote officers, who, by their careless or corrupt administration of the trust reposed in them, might to a great extent nullify the policy of the government as to the disposal of its lands to actual settlers and improvers only. That a policy that congress had, and since has, taken such pains to establish and carry out, should be left at the mercy of such inferior and remote officers, does not seem reasonable. The opportunities for evasions of such policy are very great, even under the most careful supervision of the highest officers of the government; and without such supervision there would be little practical utility in all the laws enacted by congress upon that subject. The language of the section in question is susceptible of the interpretation claimed for it by plaintiff in error, but when viewed in the light of other statute law and public policy, we cannot believe that such was the intention of congress.

The adjudicated cases upon this subject are quite numer-

ous, and, though there may be found in some of them expressions which seem to give force to the claim of plaintiff in error, yet we think that, when examined in the light of the facts of each particular case, they will be found to better harmonize with the contention of defendant in error. In fact, after a somewhat exhaustive research, we have been unable to find any case that fully supported the plaintiff in error's contention, or that could not be harmonized with the positions of the defendant in error, except two cases in the circuit court of the United States for the district of Oregon. *Smith v. Ewing*, 11 Sawy. 56 (23 Fed. Rep. 741); *Wilson v. Fine*, 40 Fed. Rep. 52. The long experience and great reputation for learning and ability of the judge who tried those cases is well known, and they on that account are entitled to great consideration and weight. The court which rendered these opinions was, however, an inferior one, whose decisions were subject to reversal on appeal, and its judgments are not entitled to the same weight as courts of last resort. The opinions in said cases, however, show that the most painstaking research was brought to the aid of the court in the decision thereof, and the argument therein is very strong; and did we not think that they stand alone, while on the other hand are a large number of cases tending more or less strongly in an opposite direction, we should perhaps be content to accept the argument of the learned judge who decided them, and sustain the contention of the plaintiff in error; but in the light of such other cases we are led to the belief that said decisions were founded too much upon the language of the particular sections in controversy, and that due weight was not given to other portions of the statutes relating to the disposition of public lands.

We shall not attempt a review of the cases cited from the state reports, as their number is too great to make a careful review of them all practicable. Besides, this is a

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purely federal question, and, so far as the supreme court of the United States has spoken, its decision must be taken as final. Cases more or less conclusive upon the subject-matter under discussion have been from time to time decided by the supreme court of the United States, and to these we must mainly look for guidance. And, first, we may say generally that a large number of cases cited by plaintiff in error passed upon the effect of a final receipt in cases where the land was subject to private entry, and where proof of any fact was not required as a prerequisite to the purchase. In this class of cases it has often been held that by the payment of the money to the government the substantial title at once vested in the purchaser, and that there was nothing further for the government to do except to complete the sale by the conveyance of the bare legal title. These cases, however, are only remotely applicable to the case at bar. In this case, while it is true that the government has received the money for the land, yet it has done so upon the assurance and proof of the purchaser that he had qualified himself under the land laws to become such purchaser; and if such assurance and proof were false, then the government has acted under a mistake as to the facts, and the reasons for concluding it would not be nearly so strong as in the former case. The settlement and improvement may be said to be a substantial part of the purchase price for which the government consents to part with its title. At the time the final receipt is issued it is supposed that that part, as well as the cash part, has been paid; but before the government has parted with its title it is found that such part of the purchase price has not been paid, and therefore the government asserts only the right which a private party would have under like circumstances in refusing to convey the contracted premises.

We shall now briefly examine a few of the cases decided by the supreme court of the United States bearing upon

this question. The case of *Wilcox v. Jackson*, 13 Pet. 498, is much relied upon by plaintiff in error. In its opinion in that case the court says: "Even assuming that the decision of the register and receiver, in the absence of frauds, would be conclusive as to the facts of the applicant then being in possession and his cultivation during the preceding year, because these questions are directly submitted to them, yet if they undertake to grant pre-emptions in land in which the law declares they shall not be granted, then they are acting upon a subject-matter clearly not within their jurisdiction;" which language is far from conclusive, as, instead of indicating that the court had actually determined the law as thus stated, it clearly shows that it was only an admission by way of argument. It is but fair to say, however, that the above quoted language, when taken in connection with the context, and of the reference therein made to the case of *Elliott v. Peirsol*, 1 Pet. 328, 340, very strongly supports the contention of plaintiff in error and, if the statute law upon the subject was the same now as when that decision was rendered, might well be cited as nearly conclusive of the question. Such, however, is not the case, for not only has the law been materially changed, but the law as thus changed has received an interpretation by the same court which, as we shall see hereafter, has destroyed the force of the case under consideration. The case of *Lytle v. State of Arkansas*, 9 How. 314, is a still stronger one and, were it not qualified by the statement just made, might well conclude our inquiry; for Justice McLEAN, in the course of his opinion, says that the findings of the register and receiver are final. These cases are entitled to but little weight in determining the proper practice under the law as it now stands. At the time the proceedings passed upon therein were had the law provided that the fact of settlement and cultivation should be proved to the satisfaction of the register and receiver, from

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whom no appeal was given and over whose acts, in that regard, no control was given by the higher officers of the land department. At the time the proceedings were had which are under review in the case at bar, the law, as we have seen, was very different. At this time the entire responsibility as to the control and disposition of the public lands had been cast upon the commissioner of the general land office; and the effect of all these provisions would seem to be sufficient to change the ruling of the court as above set forth; and, as we read the cases, such has been their effect.

In deciding the case of *Barnard's Heirs v. Ashley's Heirs*, 18 How. 43, Mr. Justice CATRON uses the following language: "In cases arising under the pre-emption laws of the 29th of May, 1830, and of the 19th of June, 1834, the power of ascertaining and deciding on the facts which entitled a party to the right of pre-emption was vested in the register and receiver of the land district in which the land was situated, from whose decision there was no direct appeal to higher authority. But, even under these laws, the proof on which the claim was to rest was to be made, 'agreeably to the rules to be prescribed by the commissioner of the general land office,' and, if not so made, the entry would be suspended, when the proceeding was brought before the commissioner by an opposing claimant. In cases, however, like the one before us, where an entry had been allowed on *ex parte* affidavits, which were impeached, and the land claimed by another, founded upon an opposing entry, the course pursued at the general land office was to return the proofs and allegations in opposition to the entry to the district office, with instructions to call all the parties before the register and receiver, with a view of instituting an inquiry into the matters charged; allowing each party, on due notice, an opportunity of cross-examining the witnesses of the other, each being allowed

to introduce proofs; and, on the close of the investigation, the register and receiver were instructed to report the proceedings to the general land office, with their opinion as to the effect of the proof, and the case made by the additional testimony. And, on this return, the commissioner does in fact exercise a supervision over the acts of the register and receiver. This power of revision is exercised by virtue of the act of July 4, 1836, § 1, which provides ‘that, from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed, by law, appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the commissioner of the general land office, under the direction of the president of the United States.’ The necessity of ‘supervision and control,’ vested in the commissioner, acting under the direction of the president, is too manifest to require comment, further than to say that the facts found in this record show that nothing is more easily done than apparently to establish, by *ex parte* affidavits, cultivation and possession of particular quarter sections of land, when the fact is untrue. That the act of 1836 modifies the powers of registers and receivers to the extent of the commissioner’s action in the instances before us, we hold to be true. But if the construction of the act of 1836 to this effect were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety;” which language, we think, directly approves of the course pursued by the land department in the case at bar; for, though it is true that in that case the contestant claimed an interest in the land at the time of the institution of the contest, yet that fact could not affect the question, as, without any appeal having been

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taken to the commissioner, he reversed the finding of the register and receiver, and ordered another hearing before them.

Had the court said only as above quoted, it would be reasonably clear that the cases of *Wilcox v. Jackson*, and *Lytle v. State of Arkansas*, *supra*, were not applicable after the passage of the act of 1836; but we are not left in doubt upon this question as the court in the case under review proceeded further to say: "The case relied on of *Wilcox v. Jackson*, 13 Pet. 511, was an ejectment suit, commenced in February, 1836; and as to the acts of the register and receiver, in allowing the entry in that case, the commissioner had no power or supervision, such as was given to him by the act of July 4, 1836, after the cause was in court. In the next case (9 How. 333) all the controverted facts on which both sides relied had transpired, and were concluded before the act of July 4, 1836, was passed; and therefore its construction, as regards the commissioner's powers, under the act of 1836, was not involved; whereas in the case under consideration, the additional proceedings were had before the register and receiver in 1837, and were subject to the new powers conferred on the commissioner." The case of *Harkness v. Underhill*, 1 Black, 316, fully sustains the right of the commissioner to review the action of the register and receiver, and makes use of language which would seem to indicate that the question was fully settled. The court say: "The question is again raised whether this entry, having been allowed by the register and receiver, could be set aside by the commissioner. All the officers administering the public lands were bound by the regulations published May 6, 1836 (2 L. L. & O. 92). These regulations prescribed the mode of proceeding to vacate a fraudulent occupant entry, and were pursued in the case before the court. The question has several times been raised and decided in this court, upholding the commissioner's powers." The above citations

are sufficient to show that the supreme court of the United States has more than once had substantially the same question before it, and that since the act of 1836 the jurisdiction of the commissioner has been sustained and approved. The case of *Cornelius v. Kessel*, 128 U. S. 456 (9 Sup. Ct. Rep. 122), does not militate against the doctrine of the cases before decided in that court. On the contrary, when carefully considered, it tends to confirm them; for while it is true that Mr. Justice FIELD, in deciding that case, in setting out the findings that may be reviewed by the commissioner, omits that of settlement and improvement, yet he does not say that this question cannot, in a proper case, be reviewed. On the contrary, he by inference recognizes that right, but says that it cannot be exercised arbitrarily, or so as to deprive an applicant of land lawfully paid for. The language of the opinion, taken as a whole, does not sustain the position of plaintiff in error; and, even if it did, it would lose much force from the fact that this was a case of private entry, where no act was required but the payment of the purchase money. This case, as we understand it, only asserts the recognized doctrine that the courts will inquire into the decisions of the land office as to questions of law, and, if erroneous, correct them. It may also be gathered from this case, as well as many others decided by the same court, that if the land officers have been imposed upon, and by mistake and fraud been induced to decide a question of fact wrongly, the court will interfere to protect the rights of the parties. This last question may at some future time arise upon the facts of the case at bar. But that question has not and probably could not have been raised in this case, and it is not necessary that we should say anything in regard thereto. On the whole case, we agree with the contention of the defendant in error, and the case must be affirmed.

ANDERS, C. J., and SCOTT, J., concur.

STILES, J., not sitting.



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DUNBAR, J. (*dissenting*). — As I indicated at the time of the filing of the majority opinion, I will now give some of my reasons for dissenting thereto. It is a common remark by practitioners before the land department that the land laws “do not amount to anything, but that everything depends upon the instructions.” But, in the investigation of rights under the land laws, I prefer to look first at the law and see if any provisions are made by the law, or direct authority given by the law, for the action of the commissioner; or whether the authority is conferred upon the commissioner, under his supervising powers, to set aside the findings of the register and receiver on the questions of residence and cultivation in case of a pre-emption proof; which is the point involved in this case. An examination of the pre-emption law shows that preceding sections state what lands shall be subject to pre-emption entry, who are qualified pre-emptors, etc.; while section 12 of the act of 1841, corresponding with section 2263 of the Revised Statutes, provides that, “prior to any entries being made under and by virtue of the provisions of this act, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the secretary of the treasury,” now by subsequent enactment changed to secretary of the interior. It seems to me that there is no room for a construction of this section. Here is a judicial authority conferred upon a tribunal in language plain and unmistakable. The power is conferred as plainly as words can state a proposition. It is the judgment of the register and receiver that is to be satisfied; not the judgment of the commissioner or the secretary of the interior. This is a judicial investigation on their part; not merely a clerical or administrative duty to be performed; a fact is to be judicially determined from evidence adduced under certain

rules and regulations of law. The rules and regulations governing the admission of this testimony, or the mode of procedure, are prescribed by the secretary of the interior, and it is the duty of the commissioner to see that these rules and regulations are observed, and that the investigation is conducted in accordance with them; but the judicial inquiry and determination of the facts, under those prescribed rules, are matters exclusively within the jurisdiction of the register and receiver, so far as settlement and improvement are concerned. I repeat, that if this investigation has not been carried on agreeably to, or in conformity with, such rules as the secretary is authorized to make, then, for that reason only, should the commissioner reject the proof, or send it back for a rehearing; for when those officers have obtained jurisdiction by reason of all the other requirements of the law having been met, and when their discretion and judgment have been legally exercised and a decision reached on the question of settlement and improvement, questions especially submitted to their discretion by the law, that decision is not subject to the supervising power of superior officers. There is a vast difference between prescribing rules and regulations and usurping judicial functions. Supervisory powers may be exercised over acts which are purely administrative or executive; but the distinction must be constantly kept in view between acts which are administrative or executive, and those which are judicial in their character. Under this section the register and receiver are authorized by law to exercise their discretion judicially. As was well said by the court in *Butterworth v. Hoe*, 112 U. S. 50: "It is not consistent with the idea of judicial action that it should be subject to the discretion of a supervisor, in the sense in which that authority is conferred upon the head of an executive department in reference to his subordinates. Such a subjection takes from it the quality of a judicial act."

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But it is asserted by counsel for defendant in error that the commissioner, at the time of ordering a rehearing in this case, acted with authority, because the following circular instructions were then in force, viz :

“Failure to inhabit and improve the land in good faith, as required by law, renders the claim subject to contest, and the entry to investigation.

“Final proof in pre-emption cases must be made to the satisfaction of the register and receiver, whose decision, as in any other case, is subject to examination and review by this office.”

I answer that, if he had no authority before the publication or issuance of these instructions, he manifestly had none afterwards. Courts must confine the enactment of laws to law-making powers. The congress of the United States is the only body that can make laws regulating the sale or disposition of the public lands. The secretary of the interior is authorized to prescribe rules and regulations to make the laws effective, and to exercise supervisory powers in certain instances; but he is not authorized to make new laws, to increase his own powers, or to take away any judicial authority that has been especially, or even generally, conferred upon another tribunal. If the secretary or commissioner are allowed arbitrarily, without any appeal, to substitute their discretion for that of the register and receiver on subjects especially submitted to them, they might logically go further, and dispense with their judgment altogether. If fraud is alleged in obtaining the final receipt, says Judge DEADY in *Smith v. Ewing*, 11 Sawy. 56 (23 Fed. Rep. 741), “the government must seek redress in the courts, where the matter may be heard and determined according to the law applicable to the rights of individuals under like circumstances. The right of a party holding a certificate of purchase of public land and that of his grantee, is a right in and to property of which neither of them can or ought to be deprived without due process of law.” I think the case of

*Wilcox v. Jackson*, 13 Pet. 498, fairly sustains the theory of the plaintiff in error; also *Lytle v. State of Arkansas*, 9 How. 314. It must be borne in mind that it is not contended by appellant that the action of the register and receiver cannot be reviewed; but the contention simply is that their decision on these two questions, of residence and improvement only, cannot be reviewed in a pre-emption case, and such I believe to be the distinction made by the cases generally; and those cases cited wherein their decisions have been reversed or set aside on some other ground do not involve the pertinent question in this case, and should not be considered. This distinction I think was plainly maintained in the late case of *Cornelius v. Kessel*, 128 U. S. 456. Said Mr. Justice FIELD, in a well considered opinion: "The power of supervision possessed by the commissioner of the general land office over the acts of the register and receiver of the local land offices, in the disposition of the public lands, undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits;" fairly implying that the entry could not be annulled on the ground of want of proof of settlement or cultivation.

But it is contended that the earlier cases are not in point, because they were decided on controversies which arose prior to the passage of the act of 1836, which enlarged the supervisory powers of the commissioner, the first section of which act is as follows: "That, from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed, by law, appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the

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authority of the government of the United States, shall be subject to the supervision and control of the commissioner of the general land office, under the direction of the president of the United States.” I am of the opinion that the act of 1841 was intended for a full, complete and independent pre-emption law, and, if it be conceded that the act of 1836 modified the act of 1830 with reference to the powers of the register and receiver, the re-enactment of the same section in 1841 must be conceded to be a restoration of that authority, and their decision would again be final on that point; and this view of the law is in harmony with *Johnson v. Towsley*, 13 Wall. 72, wherein Justice MILLER says that “the act of 1841 so enlarged the right of pre-emption as to have been ever since considered the main source of pre-emption rights.” And it may be observed in this connection, that in all the cases relied upon by the majority, while the decisions were rendered subsequent to 1841, yet all the controverted facts had transpired prior to the passage of the act of 1841.

However, conceding that the law of 1836 is still in full force, I cannot conceive how it can in any manner conflict with § 12 of the law of 1841; for it will be observed that the law of 1836 refers exclusively to the executive duties appertaining to the survey and sale of the public lands. Certainly an executive act spoken of in general terms in the act of 1836 has no reference to a judicial duty especially imposed upon a certain tribunal. But, if there could possibly be any doubt on this question, it has been squarely met and settled in the case of *Butterworth v. Hoe*, 112 U. S. 50. There it was announced that the executive supervision and direction which the head of a department may exercise over his subordinates in matters administrative and executive, do not extend to matters in which the subordinate is directed by statute to act judicially. This was a case growing out of the patent office

department; but the subject of supervisory powers in general, including the supervisory powers in the land department, was reviewed with care and ability by Mr. Justice MATTHEWS, and the doctrine announced therein, it seems to me, is squarely decisive in this case. So far as the case of *Harkness v. Underhill*, 1 Black, 316, is concerned, I cannot see its application to the case at bar. That was not a contest under the pre-emption laws, but simply under a special law passed April 5, 1832, which allowed parties a pre-emptive right to purchase not to exceed 160 acres of land which they had already settled and improved prior to the passage of the act, and the parties in that case had made settlement and improvement in anticipation of the passage of the act. The act specially provided that all the entries should be made under regulations prescribed by the secretary of the interior. There was no provision in the act for proof of residence or improvement to the satisfaction of the register and receiver, and the main question involved in this case was not and could not have been involved in that. *Barnard's Heirs v. Ashley's Heirs*, 18 How. 43, seems to be more in point, so far as some of the expressions in the opinion of the court are concerned, though the material facts in that case were essentially different from the facts in this case. There one of the main questions involved was whether or not the lands were subject to pre-emption at the time of Barnard's attempted entry. It is not contended here that that would not be a proper question for review by the commissioner.

I do not think that it is the province of the court to nullify a plain provision of the law by an argument based upon the bad policy of the law; that is purely a legislative prerogative; though, in my judgment, the view of the law, as contended for by the appellant, can be maintained upon the highest grounds of public policy, and in strict accordance with a just and equitable administration of the laws.

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It is and should be the policy of the law that rights should be speedily adjusted, and that litigation should be terminated as soon as is possibly consistent with a rightful determination of the matters in controversy. Especially is this true with reference to rights under the land laws, where the home of the citizen is involved. Every consideration of public policy and of private right then calls for a speedy adjustment. The law recognizes the necessity, and, while leaving the more general questions to be reviewed and determined by the higher officers of the department, especially clothes a local tribunal with the power of determining the local fact of residence and improvement, under such rules and regulations as may be prescribed by the department. These officers are on the ground. They are acquainted with the character and reputation of the people making the proof. In many instances they meet the witnesses face to face; in fact, this was the universal practice at the time the law was enacted. They are acquainted with the country, its topography, its soil, and its climate. They know the peculiar circumstances surrounding the settler, in his sometimes successful and sometimes unsuccessful efforts to cultivate the soil; and they are better calculated to pass intelligently on the settler's rights in those particulars than is the commissioner or secretary, albeit "they are lower officers in the department, and are more remote from the seat of government." As one member of this court, I cannot indulge in the presumption that an officer's tendency to a careless or corrupt administration of a trust reposed in him is in proportion to his rank or the distance of his habitation from the seat of government. I prefer to believe that —

"The rank is but the guinea-stamp;  
The man's the gowd for a' that."

But, that all possible safeguards might be thrown around this investigation, the act of 1879 provides that notice of

proof shall be given by publication in a newspaper nearest to the land in question for thirty days before the day of proof, and that the names of the witnesses by which claimant intends to establish his claim shall be given in such publication. Opportunity is thus given, to any one who has knowledge of bad faith on the part of the claimant, to appear and resist the claim. Up to this time the settler understands that he must look out for, and have on hand the necessary witnesses, and he makes arrangements accordingly. He makes his proof as the law requires, and to the satisfaction of the tribunal empowered by the law to pass upon the sufficiency of proof. No one appears to contest his right. No appeal is taken from the decision rendered. He pays the money demanded by the government, and so far as he knows, and is able to ascertain, the case is closed. His final certificate issues. He takes possession of the land, and pays taxes on it. His witnesses are allowed to depart and leave the country, as they are very liable to do in all new countries. He makes valuable improvements on the land, and all the results of his years of labor between the time that he makes his proof and the long time which frequently elapses before patent issues is absorbed by the land; and I agree with the attorneys for the appellant that to subject him during all this time to the uncertainties of an arbitrary proceeding or hearing before the officers of the executive or political branches of the government, at a time when he may be helpless to secure the evidence which he needs, and where he may be overwhelmed with so-called "testimony," which does not have the sanction even of an oath upon which perjury can be prosecuted, is so obviously unjust and unfair that the courts ought not to sanction it.

In the case at bar, Pierce made his final proof to the satisfaction of the register and receiver on the 13th day of February, 1883, paid to those officers the sum of \$400, and



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received his "patent certificate." No appeal was taken from this decision; but six months afterwards, Frace, a stranger, filed with the commissioner an affidavit alleging that Pierce had not established a residence upon said land. No action was taken by the commissioner upon this notice until May 16, 1885. Thus it will be seen that after the expiration of two years and three months from the adjudication of this case Pierce's right to this land was called in question in this summary manner. The judgment was re-opened and set aside. The land was awarded to the informer, the government retaining the purchase price paid by Pierce, presumably upon the ground that perjury had been committed in making the proof, without giving him an opportunity to answer that charge in a court of competent jurisdiction, where a judicial determination could be had on that question. There is no claim that the land was not properly subject to pre-emption entry, or that Pierce was not a qualified pre-emptor, or that the register and receiver had not complete jurisdiction of the case when it was first tried, but the sole question involved was one of residence. This question having been once decided by the proper tribunal, and certificate of patent having issued, I think that the commissioner acted without authority of law in disturbing that decision.

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Statement of the Case.[2 Wash.]

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[No. 65. Decided February 11, 1891.]

GEORGE F. ORCHARD v. WM. ALEXANDER.

*Error to Superior Court, Pierce County.**Doolittle, Pritchard & Stevens*, for plaintiff in error.*Judson, Sharpstein & Sullivan*, for defendant in error.

HOYT, J.—Substantially the same questions have been argued in this case as in that of *Pierce v. Frace*, ante, p. 81 (just decided), and, for the reasons therein stated, the judgment of the lower court must be affirmed, and it will be so ordered.

ANDERS, C. J., and SCOTT J., concur.

DUNBAR, J., dissents.

STILES, J., not sitting.

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[No. 74. Decided February 11, 1891.]FRED FURTH, J. J. WHITE, J. S. WATSON AND A. P.  
CURRY v. D. A. MCINTOSH.

## JUSTICE OF PEACE—POLICE MAGISTRATES—COMPENSATION.

A justice of the peace who has been designated under the charter of a city to act as police magistrate therefor can receive only such fees as are provided by general statute, and a municipal ordinance fixing the salary of such police magistrate is void.

*Appeal from Superior Court, Spokane County.*

Action by D. A. McIntosh against Fred Furth, as mayor, J. J. White, as clerk, J. S. Watson, as treasurer, and A. P. Curry, as police magistrate, of the city of Spokane

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Falls, to enjoin the payment to said police magistrate of the salary of \$150 per month as provided by an ordinance of said city. Defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendants electing to stand upon their demurrer and declining to plead further, judgment was rendered in favor of plaintiff, from which judgment defendants appeal.

*S. G. Allen, and P. F. Quinn, for appellants.*

The office of police magistrate under §§ 26 and 27 of chapter 3, and § 68 of chapter 8, and § 20 of chapter 2 of the charter of the city of Spokane Falls (Laws 1885-6, p. 300) is not a judicial office. A police magistrate chosen for the purpose of enforcing a police regulation or city ordinance is not a judicial officer, nor is his office a judicial office within the meaning of the organic act. *Shafer v. Mumma*, 17 Md. 331 (79 Am. Dec. 656); *Hutchings v. Scott*, 4 Halst. (N. J.) 218; *State v. Maynard*, 14 Ill. 420; *Beesman v. Peoria*, 16 Ill. 484.

*Turner & Graves, and W. C. Jones, for appellee.*

The opinion of the court was delivered by

HOYT, J. — Under its charter the city of Spokane Falls was authorized to designate one of the justices of the peace residing therein as police justice of said city, and the said justice, when so designated, was authorized to try offenders for alleged violations of the ordinances of said city. There was a provision of said charter which authorized the city to establish and regulate the fees and compensation of its officers, except when otherwise provided. By virtue of these provisions, one of the defendants had been designated as such police justice, and his compensation for services rendered as such justice fixed at a salary of \$150 per

month, and the sole question argued by counsel, and presented for our determination, is as to the power of said city to provide this compensation for such services. If the jurisdiction to perform the acts required of such officer under said charter is derived primarily from the fact that he has been designated as police justice, there would be strong reason for holding that, under said provisions of its charter, said city might provide as compensation therefor the above stated salary. If, on the other hand, such jurisdiction arises from the fact that he is a justice of the peace, then it would be more reasonable to hold that his compensation should be governed by the general provisions of the statute, which provide certain fees for the several acts required to be performed by such justice of the peace. Unless the contrary intention was clear, it would be presumed that the legislature intended to provide the same compensation for like acts performed by justices of the peace throughout the state. And we do not think such intention sufficiently appears in the language of the charter of said city, as every word in the charter can be given its full force as well by holding that the above stated provision, allowing the city to fix the compensation of its officers "except as otherwise provided" meant "as otherwise provided by law," as by holding that it meant as otherwise provided in said charter. In fact, the words used would be the ordinary ones to express the former meaning, while the latter would be much more likely to be expressed by the limitation, "except as otherwise provided herein," or "in this charter."

Plaintiff in error has evidently foreseen that the main contention must be as to the capacity in which said officer acted. Hence almost his entire argument has been to show that acts required of such officer were non-judicial in their character, and could therefore be conferred on other officers than those mentioned in the organic act as the only

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ones in whom could be vested judicial authority. With their contention in this regard we cannot agree, for, although there are some authorities to the effect that violations of the provisions of ordinances of cities can be tried by others than judicial officers, we think that under the organic act of the territory and the legislation and practice thereunder, the proceedings had to punish for a violation of city ordinances were as purely judicial as any other proceedings before justices of the peace. The provisions of the charter in question tend strongly to establish such fact; for, if the acts required were non-judicial, why was the city required to fill such place of police justice by some one of the justices of the peace residing in said city? We think that every act of such police justice was the act of a justice of the peace, and that the only object or effect of his designation as such police justice was to provide a single officer before whom the causes under the city charter should be brought. Without such provision the business would be divided between the several justices of the peace residing in such city, which would not so well subserve the convenient and economical administration of the affairs of the city as would a single judicial officer. It follows that the compensation provided by general statute applies to the officer in question, and that the ordinance providing for a salary therefor is void, and the judgment of the lower court must be affirmed, and it will be so ordered.

ANDERS, C. J., and SCOTT, STILES, and DUNBAR, JJ.,  
concur.

[No. 89. Decided February 11, 1891.]

FRONT STREET CABLE RAILWAY COMPANY v. F. JOHNSON, D. NELLES, H. J. LEAIRD, I. B. CUNNINGHAM, D. LANDSBURG, H. HARRISON, P. NELSON, CHARLES WILSON, T. STACKPOLE, F. J. HILL, J. P. BROWN, J. MUNTER, AND D. CLARK.

## MECHANIC'S LIEN—STREET RAILWAYS.

A laborer can have no lien upon a street railway, under ch. 138, Code 1881, unless the person causing the railway to be constructed has some estate in the land over which it is laid.

*Appeal from Superior Court, King County.*

The facts are stated in the opinion.

*Struve, Haines & McMicken*, and *James Kiefer*, for appellant.

A street cable railway constructed in a public street of a city by virtue of a franchise is not the subject of a mechanic's lien, and cannot be taken in execution and sold. It is there by right of its franchise, and any purchaser or transferee who would attempt to use the road, and necessarily the street, without the franchise, would be a trespasser. At common law corporate franchises cannot be taken into execution and sold. *Gue v. Tide Water Canal Co.* 24 How. 257; *Randolph v. Larned*, 27 N. J. Eq. 557; *Stewart v. Jones*, 40 Mo. 140; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 27 (43 Am. Dec. 315); *Mahoney v. Spring Valley Water Works Co.* 52 Cal. 161. There is no statute in Washington authorizing the levy of an execution or the creation of any other lien upon corporate franchises. Whatever may be necessary to the exercise of the corporate franchise of a railroad cannot become the subject of a mechanic's lien, and cannot be taken in execution and sold. Phillips, Mech. Liens (2d ed.), § 180; *Dunn v. Railroad Co.* 24 Mo. 493;

2	112
7	575
25*	1084
35*	399
26*	189
34*	151

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*McIlvain v. Hestonville R. R. Co.*, 78 Am. Dec. 698, note. A cable railroad company like the appellant has no interest whatever or property in the street in which its road is laid. Ownership or estate in real property is at the very foundation of the whole system of mechanics' liens, and upon this basis rests the whole theory of liens

*McGilvra, Blaine & De Vries*, for appellees

The laws of the State of Washington grant a right of lien to mechanics and laborers upon railroads and similar structures. Under such a statute a lien can be had upon a street car line. Code of 1881, ch. 138; 2 Jones' Liens, §§ 1628-39; *Williams v. City Electric Street Ry. Co.* 41 Fed. Rep. 556; *Benedict v. Railroad Co.*, 24 Conn. 320; *Louisville etc. Ry. Co. v. Boney*, 117 Ind. 501 (20 N. E. Rep. 432).

The opinion of the court was delivered by

STILES, J.—The decree from which this appeal was taken established that the appellees were entitled to the foreclosure of their numerous liens upon the cable railway of the appellant on Front and other streets, in the city of Seattle, and the power-house connected with the railway, and the machinery connected with the power-house, and ordered the sale of the same or so much thereof as might be necessary to raise the amount due the appellees. The liens thus adjudicated had been filed against the railway, etc., for labor performed at the instance of a sub-contractor in connection with the construction of the concrete road-bed, laid in the streets for the reception of the rails. Numerous questions growing out of the lien statutes of this state were pertinently raised by the record, but underlying all the others is that as to whether a lien can be maintained upon a street railway under chapter 138 of the code. With this point resolved in the affirmative, we should be required to review the case further; but if it is decided in

the negative, the judgment establishing the lien and ordering a sale must be reversed. Section 1957 specifies the structures upon which an unpaid laborer may have a lien. One of these is a "railroad"; another is "any other structure." The lien is given upon the structure, and the land upon which it is erected, and, unless there can be a lien upon the land, there can be none upon the structure. This position was taken in the case of *Kellogg v. Littell & Smythe Manufacturing Co.*, 1 Wash. 407 (25 Pac. Rep. 461), decided at the last session of this court. Therefore, to authorize a lien in the case of a street railway, it would be necessary that the person who caused the railway to be constructed have some estate in the land over which it was laid. This it could not have, as the fee of the streets of Seattle is in the city for the public use, the general public having the easement of use, and the municipal authorities having power to grant only a license to street-railway builders to occupy and use, as a part of the public easement, such portions of the streets as is necessary to the operation of their cars. Acts 1885-86, p. 244. The street railway company owns the structure laid by it on the highway, and a franchise to collect fares. *Pierce, Railroads*, 252. The license of the street railway company is not a distinct easement. *Attorney-General v. Railroad Co.*, 125 Mass. 515 (28 Am. Rep. 264). And it creates no additional burden upon the land for which abutting owners are entitled to compensation, unless there are special reasons therefor. *Elliott, Roads & S.* 558; *Mills, Em. Dom.*, § 205; *Lewis, Em. Dom.*, § 124; *Rorer, Railroads*, 1425. Being unable to find, therefore, that a street railway is such a "structure" as the statute contemplates, the conclusion follows that the right of the lien does not exist.

We deem it to be a clear proposition, also, that these "railways" are not "railroads"; according to the usual and ordinary meaning of the word, to which reference must



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Opinion of the Court—STILES, J.

be had for the interpretation of a statute. The difference between these two valuable instruments of public convenience was clearly pointed out in the earlier days of street railways, in a contest for the possession of some of the streets of the city of Louisville, Ky., between a railroad company and a street railway company. The case reported is that of *Louisville, etc., R. Co. v. Louisville City Ry. Co.*, 2 Duv. 175. The legislature of Kentucky, in 1860, in furtherance of a certain railroad enterprise in which the state had an interest, enacted that "no other railroad" should be constructed in certain streets in the city of Louisville. Later, a street railway company was organized, and under license from the city of Louisville, commenced to lay its tracks on some of the streets mentioned in the act of 1860. The railroad company sought to enjoin the new company, on the ground that its rights under the act of 1860 were being violated. This brought up the question whether the street railways proposed to be built were "railroads," within the meaning of the statute, and the Kentucky court of appeals holding them not to be, refused the injunction. In its decision the court said: "A 'railroad' and a 'street railroad' or way are, in both their technical and popular import, as distinct and different things as a 'road' and a 'street,' or as a 'bridge' and a 'railroad bridge.' . . . A street railway is not, in either the popular or legislative sense, a railroad." This case is cited with apparent approval in 2 Rorer, Railroads, 1422, and in Elliott, Roads & S., p. 558, and we agree with the views there expressed. For these reasons the decree must be reversed as to the appellant, and the cause as against it dismissed; and it is so ordered. Costs to appellant.

ANDERS, C. J., concurs.

DUNBAR, J., concurs in the result.

HOYT, J., did not sit at the hearing of the cause, he being disqualified.

SCOTT, J. (*dissenting*). — I concur in the result as to all the appellees excepting Brown and Johnson, on the ground that except as to these two there was no proof by the lienors that their claims had not been paid. I think that in a case like this, where the claimants had contracted and dealt with another than the owner of the property in relation to the matters out of which their claims arose, the burden of proof was upon them to show that the respective sums claimed were still due and owing them, as these were matters as to which the owner might and probably would have no knowledge, and that such circumstances are sufficient to take it out of the general rule in relation to the proof of payments. While payment is usually an affirmative defense, yet, where property of a third person is attempted to be taken by operation of law to satisfy a claim against another party, the plaintiff should prove all facts necessary to entitle him to the relief prayed for. Lien claimants are required to swear that the amount claimed is justly due in order to obtain a lien, and they should also be required to prove their claim at the trial in cases like this. I can see no reason why a lien cannot be had and enforced on a street railway, including such franchise or right-of-way as may be connected therewith in the use of the street itself, under chapter 138 of the code, without any strained construction or interpretation of its provisions; and the case of *Kellogg v. Littell & Smythe Mfg. Co.*, 1 Wash. 407, cited, does not conflict therewith. The company certainly had the right to operate its road on the streets where it was laid. It would not be contended that a lien cannot be had on a building erected by a lessee on leased land, together with the right of the lessee in the land itself, in so far as the same should be necessary to the use of the building, where the lessee had the right to erect and use the building, and there is little difference in principle between such a case and this one. As to Brown and Johnson, I think the judgment should have been affirmed.

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Statement of the Case.

[No. 116. Decided February 11, 1891.]

ALEXANDER McLEOD v. I. C. ELLIS.

VENUE—LOCAL AND TRANSITORY ACTIONS—CONVERSION OF TREES  
—ERRONEOUS INSTRUCTIONS.

The provision of § 50, Code of 1881, permitting trial in the county where an action is commenced, although not the proper county, unless the defendant files an affidavit of merits and demands that the trial be had in the proper county, applies only to transitory actions, and not to such as are local in their nature, and consequently actions for injuries to real property must be tried in the county or district where the real property lies.

The term “district,” as used in § 47 of the Code of 1881, refers only to districts composed of two or more counties joined for jurisdictional purposes, where sessions of court are held in but one of the counties.

In an action for the wrongful conversion of trees, which was not commenced nor tried in the county where the land was situated, a paragraph of the complaint, based upon § 602 of the code, relating to trespass upon land, and claiming treble damages thereunder, may be rejected as surplusage, and the action treated as merely one of conversion, for the purpose of sustaining the jurisdiction of the court.

An instruction that in a case where treble damages could be awarded under § 602, the jury could themselves assess the treble damages, is erroneous, as it is the province of the court, after the jury has assessed actual damages, to treble the damages in its judgment; nor can such erroneous instruction be regarded as harmless, where the jury awarded a certain amount as “single damages,” as some of the jurors may have agreed to a large verdict for “single damages,” if other jurors consented to waive their view that the damages should be treble.

*Appeal from Superior Court, Thurston County.*

Action by I. C. Ellis against Alexander McLeod, for the conversion of trees, commenced in the territorial court for the second judicial district of Washington Territory, holding terms at Olympia, in Thurston county. Both Pierce county, where the land was located upon which the trees had been cut and carried away, and Thurston county,

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3	561
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2	117
5	641
26*	76
33*	554
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2	117
16	400
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2	117
27	67

where both parties to the suit resided, were portions of the second judicial district of Washington Territory. Prior to the joinder of issues and trial of the cause, the territory had been admitted to the union of states. Trial in Thurston county, and verdict and judgment for plaintiff, from which defendant appeals. The facts sufficiently appear in the opinion.

*Allen & Ayer*, for appellant.

Sections 602 and 603 of the code are declaratory of the common law. As common-law trespass for injury done to real estate is a local action, the plaintiff must declare his injury to have happened in the very county and place that it really did happen, and the action could only be prosecuted in the county in which the close was situated. 2 Cooley's Blackstone, bottom page 163, and note 3; 1 Chit. Pl. 280; *Sumner v. Finegan*, 15 Mass. 280; *Putnam v. Bond*, 102 Mass. 370; *McGonigle v. Atchison*, 33 Kan. 726; Code 1881, § 47; *Wood v. Mastick*, 2 Wash. T. 69.

Section 602 of the code gives an action to the owner of the land against any person who "without lawful authority cuts down, girdles or otherwise injures or carries off any tree, timber, or shrub," etc., and authorizes the recovery of treble the amount of damages claimed or assessed for "such trespasses, or any of them." At common law, the action would be trespass *quare clausum fregit*, and the statute is a declaratory one. So being, it must be construed by that law. *Baker v. Baker*, 13 Cal. 95; *Com. v. Humphries*, 7 Mass. 242; Bish. Written Laws, p. 144. The gist of the action is an injury to the possession, and the element of force is essential (1 Chit. Pl. 195, *et seq.*), and the damage and lessening of value of the land is what the jury must assess, and for which they must find their verdict. The complaint fails to aver that the entry was "without lawful authority," and fails to make any averment of damage to the land.

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*J. W. Robinson, and D. P. Ballard, for appellee.*

When the proper parties are before the court it is not necessary that the *res* be within the court's jurisdiction. *Barrell v. Root*, 40 N. Y. 498; *Phelps v. McDonald*, 9 Otto, 308, and authorities cited; *Miller v. Sherry*, 2 Wall. 239, and cases there cited.

The opinion of the court was delivered by

STILES, J. — This action was commenced in the territorial district court held in Thurston county, for treble damages, upon a complaint containing the following allegations:

"(1) That between January 1 and September 1, 1889, the defendant entered upon the south half and the northeast quarter of the northeast quarter of section 33, in township 21 north, range 1 west of the Willamette meridian, in the state of Washington, being situated in the county of Pierce, and owned by this plaintiff, and in his possession, and did then and there, without leave of plaintiff, cut down, remove, dispose of, and convert to his own use the proceeds thereof, about ——— trees, containing fourteen hundred thousand feet of lumber, of the value of four thousand two hundred dollars. (2) That by reason of said removal and conversion the said defendant became and is indebted to plaintiff in the full sum of four thousand two hundred dollars, no part of which has been paid; and defendant has refused and does now refuse to pay the same or any portion thereof. (3) That by force of section 602 of the Code of Washington, defendant became and is liable to plaintiff in the full sum of twelve thousand six hundred dollars."

The land upon which the acts complained of were committed was in Pierce county. The defendant's demurrer to the jurisdiction of the court, for the reason that the action was not commenced in the proper county, was overruled, and the cause proceeded to judgment.

The code, both by its express terms and by inferential provisions, seeks to reduce every private wrong to a dead

level, so far as pleading is concerned, so that a complaint containing a plain statement of facts serves to lay the cause of action before the court, no matter what may have theretofore been the technical form or name of the remedy. Accordingly, chapter 49, "Of Waste and Trespass," was adopted in furtherance of the general plan. The injuries to land which, when committed by persons lawfully in possession thereof, had been cognizable in the technical action of waste, were assembled in § 601, while those in which a stranger to the land was the wrong-doer, and which had been cognizable in the action of trespass, were collected and provided for in §§ 602 and 603. The common-law remedies remained, although there made statutory, and the nature of each action continued as before, though they are now known as actions for injuries to real property, instead of waste in the one case and trespass in the other. Therefore, unless the last clause of § 50 applies as well to the actions included in § 47 as to those included in § 48, the Thurston district court had no jurisdiction of the cause if it was one for injuries to land. Section 47 pointedly says that actions for injuries to real property shall be commenced in the "county or district" in which the subject of the action, or some part thereof, is situated. If commenced there, they must be tried there, unless removed for reasons sufficient under § 51. But appellee contends that the last clause of § 50 shows that the requirement that these actions be commenced in the particular county or district is merely directory, and that, unless the defendant moves in the manner provided therein, the trial may be had in any county or district selected by the plaintiff. It is agreed that no affidavit of merits, and no demand for a trial in Pierce county, were made. We cannot agree with this contention, however. There is a marked difference between the language of § 47 and §§ 48 and 50. The former refers to a peculiar class of actions which were always local, while the

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latter only includes actions which were always transitory. The first named says the actions specified must be commenced in certain counties or districts, while the others only require the trial to be in the county or district where the property is or the defendant resides, as the case may be. Coming in the connection where it is, and in view of the difference in language, we are constrained to hold that the last clause of § 50 does not apply to the actions enumerated in § 47.

Still another objection is raised, however, namely, that section 47 does not absolutely require actions for injuries to real property to be commenced in the county where the subject of the action is situated, but extends the jurisdiction to the whole judicial district, which, in this instance, included both Pierce and Thurston, as well as many other counties; and, if that position is correct, the Thurston county court was fully authorized to entertain the action. But we are not satisfied that the term "district," as used in section 47, has the meaning claimed for it. The four judicial districts formerly existing under the territorial *regime* were merely divisions of the territory for the assignment of the judges, and for some purposes of United States jurisdiction. No jurisdiction of matters cognizable under the territorial laws merely was based upon those districts. Here, as in the states, counties were the units of jurisdiction, and to them reference was made when any action was spoken of as "local" as distinguished from one which was "transitory." But not every county had the privilege of sessions of the courts within its limits, and where two or more counties were joined for jurisdictional purposes they constituted a "district" in the sense in which the word was used in § 47, and action for injuries to real property could be commenced in the court of such a district only. The case of *Wood v. Mastick*, 2 Wash. T. 69, in a few words, announced the same conclusion here expressed.

Under the construction thus adopted, were we to hold further that the action was one for injuries to the realty, the judgment would necessarily be reversed, and the action dismissed for want of jurisdiction in the court below. But the appellee contends, and, on the whole, we conclude, rightly, that his action was one for the value of his trees as personalty merely, without any claim for injury to the land. The complaint was apparently drawn under the impression in the mind of the pleader that § 602 allowed treble damages for such a conversion, and the court below seems to have taken that view. To sustain that interpretation and secure that measure of damages, the complaint, in its third paragraph, alleged the conclusion "that by force of § 602 of the Code of Washington defendant became and is liable to the plaintiff in the full sum of twelve thousand six hundred dollars," which amount was three times the alleged damage, and the prayer was accordingly. The second paragraph was entirely impertinent to a complaint for injuries to land under § 602, and so was the allegation in the first paragraph, that the trees cut contained 1,400,000 feet of lumber, of the value of \$4,200, since the necessary and proper allegations of such a complaint were merely that certain trees had been cut down to plaintiff's damage. But if we allow paragraph 2 to stand, by which it was alleged "that by reason of the said removal and conversion [alluding to the trees, the quantity of lumber and the value] the said defendant became and is indebted to plaintiff in the full sum of \$4,200, no part of which has been paid," etc.; and if we entirely reject paragraph 3 as surplusage, there is a faulty, but still sufficient, complaint for a wrongful conversion of the trees. We confess that in so holding, however, we have extended the liberality allowable in favor of pleadings to its furthest limit, being constrained thereto in part by the rules in favor of jurisdiction.

The judgment must be reversed, however, for the court



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Concurring Opinion — HOYT, J.

charged the jury erroneously in two respects. In the *first* place, the jury were told that this was a case wherein treble damages could be awarded under § 602, unless the taking was casual or involuntary, etc., and, *secondly*, that the jury could themselves assess the treble damages. Neither of these instructions was correct. We have already shown why the main charge was wrong; but, even if there had been a case for treble damages the province of the jury, under the statute, went no further than to assess the actual damage, and find whether it was willful or excusable, leaving it to the court to treble the damages in its judgment. See § 602. The jury in this case awarded a certain amount, "single damages," which appellee claims shows appellant not, in any event, to have been injured by the court's charge. But it will not do to presume no injury in a case where the whole charge was so clearly erroneous, based, as it was, on an altogether wrong theory of the case. Jurors, under the charge, might well have agreed to a larger verdict for "single damages," other jurors consenting to waive their view that the damages should be treble, and thus no just verdict would have been found.

The cause must go back for a new trial, wherein the measure of damages will be the value of the trees at the instant when they first became severed from the real estate, without further manipulation. See 4 Am. & Eng. Enc. Law, p. 123, and cases cited. The plaintiff will have leave to amend his complaint, if he desires. Cause remanded; costs to appellant.

ANDERS, C. J., and DUNBAR and SCOTT, JJ., concur.

HOYT, J. (*concurring*).—I agree with the majority of the court that the judgment should be reversed. But I cannot thus agree as to the disposition of the case. I think that the plaintiff, having specifically stated in his complaint

Opinion of the Court—DUNBAR, J.

[2 Wash.]

that he brought his action on a certain section of the code, and claimed damages thereunder, should be bound by such statement, and that therefore the cause of action stated in the complaint in this suit was one of damage to lands, and should have been brought in Pierce county, and that the court below should be directed to dismiss the action.

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[No. 125. Decided February 11, 1891.]

GEORGE STOWE v. THE STATE OF WASHINGTON.

CONSTITUTIONAL LAW—COSTS IN CRIMINAL PROSECUTIONS—STENOGRAPHER'S FEES.

The constitutional provision (art. 1, § 22) that "in no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed," has reference to the final judgment of the trial court, and not of the supreme court.

The county commissioners cannot be compelled, for the benefit of the accused in a criminal prosecution, to pay for a copy of a stenographer's report of the trial.

*Appeal from Superior Court, Pierce County.*

*Frank L. Kuhn, and Heilig & Heuston, for appellant.*

*W. H. Snell, Prosecuting Attorney, and Charles Bedford, for appellee.*

The opinion of the court was delivered by

DUNBAR, J.—The defendant, upon the information of the prosecuting attorney of Pierce county, was tried for the murder of Enoch Crosby, and on April 25, 1890, found guilty of murder in the second degree. On May 17, 1890, he presented his motion for a new trial, based upon errors of the court, newly discovered evidence, and that

2 124  
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Opinion of the Court—DUNBAR, J.

the verdict was contrary to law and the evidence, which motion was overruled, and defendant, on same day, sentenced to imprisonment in the state penitentiary for twenty years. On June 11, 1890, his attorneys gave notice, in open court, of appeal to the supreme court of the state, which was duly entered upon the journal. Defendant's attorneys on the same day served the prosecuting attorney with notice that on June 23, 1890, they would appear before the judge that had tried the case, for the purpose of settling a statement of facts to be transmitted with the transcript of the cause to the supreme court. On the 16th day of June, 1890, defendant's attorneys presented and filed his petition, setting forth that in order to prosecute his appeal it was necessary to make a transcript of the testimony, rulings and charge of the court given at the trial a part of the statement of facts; that these were taken in shorthand by the official reporter of said court, and no longhand transcript had been made thereof; that the reporter refused, on demand, to furnish a longhand transcript thereof unless he was paid the sum of \$100 in advance as part of his fees for making such transcript; that the defendant had no means whatever, and could not procure the money to pay said sum; and praying the court to make an order directing the county commissioners of Pierce county to pay or advance said sum in payment of said fees. But the court, on the 16th of June, 1890, entered an order denying the prayer of the defendant, and refused to grant him the relief prayed for; to which order defendant on same day excepted, and exception was allowed. From this order defendant appealed, and gave notice of appeal in open court, June 23, 1890.

Appellant bases his claim upon § 22, article 1 of the Constitution of Washington, which reads as follows: "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature

and cause of the accusation against him; to have a copy thereof; to testify in his own behalf; to meet the witnesses against him face to face; to have compulsory process to compel the attendance of witnesses in his own behalf; to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed;" and argues that the "final judgment" mentioned in said section means the final judgment of the supreme court instead of the trial court. We do not think this position tenable. By an inspection of the section cited, it will be seen that all the rights and privileges guaranteed to the defendant are rights and privileges necessarily antecedent to the judgment in the trial court; and although the right to appeal in all cases is guaranteed, construing all the provisions of the section together, it is clear that the qualification "before final judgment" refers to the final judgment in the trial court, and that the interjection of the words "and the right to appeal in all cases" is simply an announcement in the declaration of rights of the right of appeal. Again, as is forcibly argued by the prosecuting attorney, if the words "final judgment" mean that judgment from which there is no appeal, the expression is meaningless; for after that judgment there is nothing more to be done for which fees or money could be demanded; and that in order to give force to the language at all, it must be construed to mean the final judgment of the trial court.

We do not think the county commissioners could, by virtue of § 2673 of the code, or by any other provision of the law, be compelled to pay for a copy of a stenographer's report of a trial for the benefit of the defendant. There is no law compelling the state or county to employ a stenographer at all. Sometimes they are employed by

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Statement of the Case.

the state, sometimes by the defense, and frequently criminal cases are tried without a stenographer; but, whenever one is employed, his services belong exclusively to his employer. If such a claim as this were allowed, it would be difficult to limit the demands of defendants in criminal actions on the county treasury. We think there was no error in refusing to grant the relief prayed for in the petition. The judgment of the court below is affirmed.

ANDERS, C. J., and HOYT, SCOTT, and STILES, JJ., concur.

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2	127
2	131

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[No. 140. Decided February 11, 1891.]

WILLIAM SCHULTE v. CHARLES SCHERING, EMMA  
SCHERING AND A. J. LITTLEJOHN.

LANDLORD AND TENANT—DEFECTIVE LEASE—SALE OF PREMISES.

Where a tenant enters into possession of premises under a lease which does not contain the name of one of the lessors in the granting clause, and which is signed but not acknowledged by the lessors, and the tenant makes improvements on the premises and pays rent therefor, he is entitled to specific performance of the terms of the defective lease, as against a subsequent vendee of his lessors, who takes with actual knowledge of such tenant's rights.

*Appeal from Superior Court, Pierce County.*

Action by William Schulte to compel the specific performance of an agreement for a lease by Charles and Emma Schering, and to enjoin A. J. Littlejohn from disturbing plaintiff in his possession of the premises described in the lease. The allegations of the complaint are substantially as follows: That on the 26th day of June, 1888, the defendants Charles and Emma Schering were the owners of the premises in dispute, and on that day demised said premises to plaintiff for the term of two years, to com-

mence on the 15th day of August, 1888; that the said lease given by said Scherings and accepted by plaintiff, through a mutual mistake of both parties, omitted the name of Emma Schering in the granting clause, and was not acknowledged by Charles and Emma Schering, though signed by both of them; that plaintiff on the 15th day of August, 1888, under and by virtue of said lease entered into the sole and exclusive possession of said premises, and has been in the sole, exclusive, notorious and open possession thereof ever since, and during such possession made valuable improvements thereon; that on or about the 15th day of October, 1888, the defendant A. J. Littlejohn purchased said premises of the defendants Charles Schering and Emma Schering, but at the time said defendant Littlejohn purchased said premises he well knew that the plaintiff was in the open and notorious possession of said premises under an agreement with the said Charles and Emma Schering; and the said defendant Littlejohn was at that time informed by the said Scherings that plaintiff was occupying said premises under an unexpired lease for the term of two years from said defendants, Charles and Emma Schering; that defendant Littlejohn has continuously harassed and annoyed plaintiff, and has endeavored in various ways to dispossess plaintiff, although plaintiff has at all times complied with all the conditions under which he holds possession of the premises leased; and that defendant Littlejohn threatens to dispossess plaintiff of said premises. To this complaint defendant Littlejohn demurred upon the ground that it did not state facts sufficient to constitute a cause of action. The court sustained this demurrer, and entered a decree dismissing plaintiff's bill and rendering judgment for costs against plaintiff. From this decree and judgment plaintiff appeals.

*Judson, Sharpstein & Sullivan*, for appellant.

*A. A. Knight*, for appellee *Littlejohn*.

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Feb. 1891.]Argument of Counsel.

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The opinion of the court was delivered by

SCOTT, J.—The question raised in this case is in substance the same as that passed upon by us in *McGlaufflin v. Holman*, at our May session, 1890. See 1 Wash. 239 (24 Pac. Rep. 439). There is an additional defect in this instrument in its not containing the name of one of the lessors in the granting clause, but this does not take it out of the principle recognized in the case cited. Judgment reversed, and cause remanded. The demurrer should be overruled, with leave to answer.

ANDERS, C. J., and HOYT, DUNBAR, and STILES, JJ., concur.

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[No. 168. Decided February 12, 1891.]

WILLIAM SCHULTE v. A. J. LITTLEJOHN.

PLEADING—ORDER STRIKING AFFIRMATIVE DEFENSE—WAIVER OF EXCEPTION.

The filing of a substituted answer by defendant does not operate as a waiver of his exception to an order striking out an affirmative defense in his original answer.

*Appeal from Superior Court, Pierce County.*

Action by A. J. Littlejohn against William Schulte to obtain possession of leased premises, after the alleged termination of defendant's right thereto. Trial by jury, and verdict and judgment for plaintiff. Defendant appeals. The facts are sufficiently stated in the opinion.

*Judson, Sharpstein & Sullivan*, for appellant.

The order striking out appellant's separate defense and cross-complaint was error. *McGlaufflin v. Holman*, 1

Wash. 239; *Leebrick v. Stahle*. 68 Iowa, 515; *Weaver v. Coumbe*, 15 Neb. 167.

A. A. Knight, for appellee.

The amended answer was the only answer in the case. When it was filed it superseded the original answer, and all questions in relation to the abandoned answer were waived by the filing of the amended answer, upon which the defendant went to trial. *Kentfield v. Hayes*, 57 Cal. 411; *Barber v. Reynolds*, 33 Cal. 497; *Kelly v. McKibben*, 54 Cal. 192; *Wells v. Applegate*, 12 Or. 209; *Hexter v. Schneider*, 14 Or. 186.

The opinion of the court was delivered by

SCOTT, J.—Appellee brought this action to obtain possession of certain land. Appellant, in his answer, denied some of the allegations of the complaint, and also set up as an affirmative defense that certain prior owners of the premises, of whom appellee subsequently purchased, agreed to lease the same to appellant for the term of two years from the 15th day of August, 1888, and that they, upon the 26th day of June in said year, executed to him an instrument, which he and they supposed to be a valid lease thereof accordingly, but that by a mutual mistake the lessors did not acknowledge the same, and the name of one of them was omitted from the granting clause therein; that appellant went into and continued in possession of the premises thereunder, made valuable improvements thereon, paid the rent stipulated, and complied with the agreement upon his part, and that appellee, when he purchased, had knowledge of appellant's rights therein. The action was brought before the term had expired. The court, upon appellee's motion, struck out the affirmative defense, to which exception was taken. Appellant then filed an amended or substituted answer, merely setting up the denials contained in



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Syllabus.

the original answer. The trial resulted in a judgment for the plaintiff. Appellee claims the matters stricken constituted no defense or ground for relief, and, if otherwise, that appellant waived the same by filing his amended answer. The first point is disposed of on the authority of *McGlauffin v. Holman*, 1 Wash. 239 (24 Pac. Rep. 439), in a case just decided by us, submitted herewith, being an action brought by appellant against appellee and said lessors, wherein the same instrument was involved. *Schulte v. Schering*, ante, p. 127. As to the second point, the filing of the substituted answer did not operate as a waiver of the exception to the order of the court striking the part aforesaid of the original answer.

Judgment reversed, and cause remanded for a retrial. The order upon the motion should be vacated, and leave to reply granted.

ANDERS, C. J., and DUNBAR, STILES, and HOYT, JJ., concur.

[No. 154. Decided February 19, 1891.]

*In the Matter of the Application of JOHN G. LYBARGER  
for a Writ of Habeas Corpus.*

**HABEAS CORPUS—VOID JUDGMENT—CONSTITUTIONAL LAW.**

The statute providing that no court shall inquire into the legality of any judgment or process whereby the party is in custody, when such custody is upon any process issued on any final judgment of a court of competent jurisdiction, precludes the supreme court, in *habeas corpus* proceedings, from questioning the judgment of a court of general jurisdiction fair upon its face.

Such statute does not transgress the constitutional provision securing the right to the writ of *habeas corpus*.

*Original Proceedings in Habeas Corpus.*

*Marshall K. Snell*, and *Heilig & Heuston*, for petitioner.

*W. C. Jones*, Attorney-General, and *Charles Bedford*, for respondent.

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19	308

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21	308

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The opinion of the court was delivered by

HOYT, J. — Upon the return of the officer to the order to show cause issued herein and the hearing had thereon, two questions are presented for our determination — (1) as to the power of the legislature to provide for the prosecution of offenses, committed before we became a state, by information; (2) as to whether or not the court, in *habeas corpus* proceedings, will go behind the final judgment of a court of competent jurisdiction for any purpose whatever. We will discuss the second question first. Our statute provides that no court shall inquire into the legality of any judgment or process whereby the party is in custody, when such custody is upon any process issued on any final judgment of a court of competent jurisdiction; and if the words “final judgment” mean what they say, it would seem to preclude the issuing of the writ in the case at bar. But it is contended by petitioner that these words refer only to judgments in cases where the court pronouncing it had jurisdiction of the subject-matter of that particular case, and of the person of the defendant; that all other judgments are void, and therefore nullities; that, however general the jurisdiction of the court might be, it would not be a court of competent jurisdiction as to that particular judgment, unless it had jurisdiction of the subject-matter of the suit and of the person of the defendant. With this contention of the petitioner we should probably agree, when applied to judgments of courts of special or limited jurisdiction, for the reason that the judgments of such courts do not even *prima facie* prove their jurisdiction to pronounce it; and, it being necessary that the facts showing jurisdiction should appear before the judgment is entitled to any standing, when these facts are wanting there is substantially no judgment. A judgment of a court of general jurisdiction, however, stands upon an entirely different footing. Such a judgment *prima facie* proves itself, and it is not necessary to aid it by proof of

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any jurisdictional facts. To authorize any of the steps that may be taken to enforce judgments of this kind it is only necessary to produce the judgment itself, as all jurisdictional facts will be presumed until the contrary appears. It is true that, when it is made to appear affirmatively by the record in any particular case that the facts necessary to jurisdiction did not exist, the presumption as to jurisdiction will be overcome; but this cannot make a writing in the form of a judgment, which, until such want of jurisdiction is made affirmatively to appear, is binding upon the whole world, an absolute nullity. The fact that it is the judgment of a court of general jurisdiction makes it *prima facie* valid, and that which is even *prima facie* valid cannot be said to be a nullity. When the officer returns as his authority for holding a prisoner a commitment which shows upon its face that such person is committed by a court of general jurisdiction in pursuance of its final judgment for a crime triable by such court, we think he has brought himself within the provisions of our statute, and that the courts are, by the terms thereof, precluded from inquiring further into the cause of detention; and that neither by having the record set out in the petition, nor by bringing it here by *certiorari*, can this court look therein to see whether or not the court had jurisdiction in that particular case. To hold that we could investigate this question in the face of the statute would be to hold that the judgment was an absolute nullity for all purposes, which we have seen would not be reasonable, and would lead to results which could not be tolerated without an entire change of practice as to the presumptions in favor of the judgments of such courts. If such judgments are nullities, then they can be good for no purpose; and every officer attempting to enforce them would be guilty of trespass or false imprisonment. Yet, so far as we know, no court has thus punished officers for enforcing the judgment of a court of general jurisdiction fair upon its face.

But petitioner contends that if the statute must be construed as above, it is unconstitutional; his claim being that the writ of *habeas corpus* is a high prerogative writ known to the common law, and that it is this common-law writ that is secured to us by the constitution of the United States and of this state; and further, that at the common law said writ was used to inquire as to the jurisdiction of the court which rendered the final judgment upon which the petitioner was held. With the first part of this claim we find little fault though it may need qualification; but as to the second part we cannot agree that the scope of this writ was as contended for until long after the date when the statute of England ceased to be a part of our common law; and even at this time it is doubtful if the practice there goes to the extent above claimed, without some important qualifications. Prior to the passage of the act of 56 Geo. III, the return of the officer was absolutely conclusive; and if he returned that he held the petitioner by virtue of process issued by a court of competent jurisdiction, that was the end of the inquiry, and, however false this return might be, the only remedy was by an action for false return. This being the law and practice in England at the time we took therefrom our common law, it cannot be successfully contended that our statute conflicts therewith, for under it, as we have seen, the return that the petitioner was held by any process or judgment good upon its face not only precluded inquiry into the validity of such process or judgment, but also precluded inquiry as to the facts of his being held by such process or judgment at all. In fact, under the English common law, as we took it, the return of the officer was absolutely conclusive. See *Church, Hab. Corp.*, §§ 138, 221. Many cases have been cited by the petitioner to show that courts will go back of the judgment and inquire as to the jurisdiction of the court that rendered it. From the decisions of the supreme court of the United

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States in particular a large number of such cases have been cited. Such cases would be in point were they construing a statute like ours, but such was not the case; on the contrary, the United States statute in force at the time these cases were decided expressly authorized such inquiry. That such cases were entirely controlled by the statute in force at the time is made clear by an examination of the course of the decisions. Prior to the statute of 1833 it was conceded that a return to this writ, showing an imprisonment under process legal and valid on its face, was conclusive. See *Church, Hab. Corp.*, § 222. Of the cases upon the subject decided by the supreme courts of the different states they are nearly all controlled by statutes different from ours, and therefore not in point. The states of Missouri and Kansas have statutes substantially like ours, and the decisions in those states seem to warrant the contention of the petitioner. The Missouri cases, however, do not seem to have been carefully considered, and are far from satisfactory. But the case of *In re Petty*, 22 Kan. 477, was a well considered case, and the court in an elaborate opinion sustains the position of petitioner, both as to the construction of the statute and as to the constitutional question. The court says that the statute cannot be held to speak of a judgment without jurisdiction for the reason that such judgment was a nullity. We have attempted to show that such judgments are not nullities, and, if we have succeeded, it follows that the reasoning of the court was from a wrong basis, and therefore without value. As to the constitutional question, the court was clearly in error as to the rule at common law; and, this being so, its reasoning, however elaborate, could have but little weight. Both of these questions have been decided adversely to the position of the Kansas case by the supreme court of the United States. In the case of *Ex parte Watkins*, 3 Pet. 193, that distinguished jurist, Chief Justice MARSHALL, in an elaborate

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Opinion of the Court — HOYT, J.

[2 Wash.

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opinion decided both of these questions, and held that, in the absence of a statute authorizing it, the supreme court could not go behind a judgment of a court of general jurisdiction to inquire as to the fact of jurisdiction in that particular case; and as the *habeas corpus* provided for in the constitution of the United States was as much the common-law writ as ours is, this case must be held conclusive of the constitutional question; and as the learned judge decides therein that judgments without jurisdiction are not nullities, this case may well be said to be decisive of this entire question. From an examination of all the cases that we have been able to find we think our statute is constitutional, and that under it we are precluded from questioning a judgment of a court of general jurisdiction fair upon its face. This conclusion disposes of the application, and makes it unnecessary to decide the first question above stated; and as such question will doubtless soon reach us in a case brought here on appeal, wherein it can be more deliberately briefed than it has been here, we think best not to decide it now. The order to show cause must be vacated, and the writ denied.

ANDERS, C. J., and DUNBAR, STILES, and SCOTT, JJ.,  
concur.

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Opinion of the Court—STILES, J.

[No. 164. Decided February 20, 1891.]

*In the Matter of the Application of JOSEPH CLOHERTY,  
alias CHARLES MALONE, for a Writ of Habeas Corpus.*

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84	461

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWERS—  
MUNICIPAL POLICE COURTS.

Cities of twenty thousand inhabitants, or more, have no power, under the constitutional authority given them to frame charters for their own government, to provide therein for the creation of municipal or police courts, as all such power is delegated by the constitution to the legislature.

The power conferred upon the legislature by the constitution to create additional inferior courts is not one of its original inherent powers as the supreme legislative body of the state, but is a delegated power which must be exercised in the manner pointed out, and cannot be again delegated. Such inferior courts can only be created by express enactment of the legislature.

There is no provision in the acts of March 24 and March 27, 1890 (Laws 1889-90, pp. 215, 131), for the establishment of police courts in cities of twenty thousand or more inhabitants.

*Original Proceeding in Habeas Corpus.*

*Marshall K. Snell*, for petitioner.

*W. H. Snell*, Prosecuting Attorney, and *M. B. Hoxie*, for respondent.

The opinion of the court was delivered by

STILES, J.—The petitioner, Joseph Cloherty, *alias* Charles Malone, shows that he is detained by James H. Price, sheriff of the county of Pierce, under conviction of the crime of assault and battery, committed in the city of Tacoma. This conviction was had in the police court of that city, and he was sentenced to a term of six months in the county jail of Pierce county. He prayed a writ of *habeas corpus* from this court, directed to the sheriff, and that upon the return thereof he be discharged from custody. An order to show cause was issued, and after argument in

which the petitioner, by his counsel on one side, and the sheriff by the prosecuting attorney of Pierce county and the city attorney of the city of Tacoma on the other side, were heard, the question of his discharge is for decision.

Petitioner's ground for his application is, that the police court of the city of Tacoma had no legal existence, and therefore no jurisdiction to arraign, try or convict him. The city of Tacoma is a city of the first class as defined by the act of March 24, 1890, and in the month of October, 1890, before the trial and conviction of petitioner, in pursuance of § 10, article 11 of the constitution and of the above mentioned act, its people framed and adopted a municipal charter. Of this charter this court, and all other courts in the state, are required to take judicial notice. It ✓ therefore appears that, among the other provisions contained in the charter, was one establishing a "police court," and the language of this provision was identical with the language of §§ 92, 93, 94, 95 and 96 of the act providing for the organization, classification, incorporation and government of municipal corporations, approved March 27, 1890; the sections above mentioned relating to the estab- ✓ lishment, jurisdiction and procedure of a police court in cities of the second class. We refer to the fact that the language found in the charter and that in the act are identical as a convenient method of making known what the constitution of the police court was without copying the instrument. It thus appears that, in so far as it was possible for it to do so, the city of Tacoma endeavored to erect a court having full jurisdiction of the offense charged against the petitioner. The petitioner, however, maintains that under the constitution of the state nothing less than the express enactment of the legislature could create or estab- / lish such a court, and that, therefore, the provisions of the charter of Tacoma were mere idle declarations, without force and wholly void.



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Opinion of the Court — STILES, J.

The State of Washington is a sovereign whose written constitution is her visible charter. By the constitution all the judicial power (which is a distinct branch of the sovereignty) is vested in the courts therein created, independently of all legislation. The jurisdiction of these courts is universal, covering the whole domain of judicial power, even to that growing out of the supposed existence of municipal ordinances. But to the legislature of the state the constitution delegates authority to transfer from one of the constitutional courts to another certain limited portions of the judicial power; and it may also provide new, inferior courts, not specifically mentioned in the constitution, to which may be assigned such part of the inferior judicial power as it may deem wise to transfer. The natural conclusion from this premise would be that a court for the administration of municipal ordinances must have been created by an act of the legislature.

But the respondent urges that the power to erect a court of this kind is necessarily implied from the constitutional authority given to cities of twenty thousand inhabitants to frame a charter for their own government; that this concession is equally as strong as the provisions with reference to courts, and that no harmonious construction of the instrument can be made unless the power thus contended for is allowed to exist.

An argument in many respects plausible may be built upon this foundation. But it must be remembered that, although the power to frame a charter is conferred by the constitution, no greater intendments are inferred from that fact that if it were conferred by a mere act of the legislature, since, by the same sections, these favored cities are to be at all times subject to the general laws of the state. They are not in any sense erected into independent governments; their existence as municipal governments depends upon the legislative will; their areas can be extended only

in the manner prescribed by statute; the elective franchise is exercised under the general laws applicable to the whole state; the power of eminent domain is not extended to them except by statutory delegation; and their municipal legislation is restricted to those subjects which rightfully belong to them in their corporate capacity. A charter framed under the constitutional provision is of no more or larger force than a legislative charter, and can lawfully treat only of matters relating to the internal management and control of municipal affairs, subject to constitutional and legislative regulations; it provides officers, ways and means, police and other minutiae of local administration which are necessary to the public convenience, peace and good order; but, for the enforcement of criminal ordinances, the constitution and the legislature have provided independent courts of competent jurisdiction in the persons of justices of the peace. Cases are cited for our consideration, which we shall allude to at this time.

While Washington was yet a territory, although it was not held by any of the territorial courts, the legislature never attempted to create municipal courts, it being taken for granted that the organic act forbade the exercise of that power by prescribing that the judicial power of the territory should be vested in certain courts therein named. But in *State of Kansas v. Young*, 3 Kan. 445, it was held that under the same organic act the legislature could provide courts in cities. And (so in *Shafer v. Mumma*, 17 Md. 331 (79 Am. Dec. 656), under the constitution of 1851, it was held that the punishment of offenses against municipal ordinances was not a judicial function at all, but merely an exercise of a branch of the police power.) The Kansas decision was based upon the fact that the legislature had committed to it all rightful subjects of legislation, which included the power to create municipal corporations with their usual incidents, and upon the view that the organic act in its pro-

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Opinion of the Court — STILES, J.

visions with regard to courts had reference only to the enforcement of the laws of the territory at large. The Maryland decision goes as far as the respondent's contention; but, upon examining the constitution of that state, we find no reference whatever to the subject of municipal corporations, except a single line, which provides that they may be created by special acts. Thus the whole matter is as completely left to the legislature as any other subject over which it has unlimited jurisdiction. We think, however, that even conceding that case to have been well decided, it is the only one that can be found going that far, and that it is not applicable under our constitution, which clearly includes the administration of city ordinances among the judicial powers of the state. Nor would the offense charged against the petitioner have been within the decision of the Maryland case, since it is one against a public law of the state (code, § 808), punishable only by indictment or information.

We were referred also to *Hutchings v. Scott*, 4 Halst. 218, a case determined in 1827, where the decision was that the legislature of New Jersey had the power, under the constitution of 1776, to declare the mayor, recorder and aldermen of cities justices of the peace for the trial of certain causes. But here again the constitution contained no reference to municipal corporations, and no definition or limitation of the judicial power, excepting that § 12 prescribed the terms of judges of the supreme and common pleas courts and justices of the peace.

We may not disagree with the cases in Kansas or New Jersey, and yet hold that the mere grant of a charter of incorporation, with power to pass ordinances and prescribe penalties for their infraction, does not confer the right to create police courts. The legislature has the largest power to define crimes and provide for their punishment; but, under the constitution, it can set up no other courts than

are therein provided for the trial of persons charged with having committed those crimes. The highest authority we have on this subject, Judge Dillon, says that it is "competent for the state legislature to create municipal corporations with powers of local government, and to authorize them to adopt ordinances or by-laws, with appropriate penalties for their violation. The power to do this includes, by fair implication, the power to authorize violations of ordinances (when the acts are not criminal in their nature, or within the meaning of constitutional provisions requiring an indictment and securing the right to a jury trial) to be tried and determined in a summary manner by a local or corporation tribunal." Mun. Cor. (4th ed.), § 428. Yet §§ 427 and 428 clearly show that the author had in mind no other thought than that the local or special tribunal must be created by act of the legislature, and its jurisdiction be by it defined.

This disposes of the first proposition of the respondent; and we next consider the claim that the legislature by the act of March 24, 1890, delegated to the cities of the first class the power to create police courts. But upon this point we deem it sufficient to say that the power conferred upon the legislature to create additional inferior courts is not one of its original, inherent powers as the supreme legislative body of the state, which can be delegated by it, but is a delegated power which must be exercised in the manner pointed out, and cannot be again delegated. Nor do we see in the act mentioned any convincing sign of an intention to delegate the authority contended for, although the thirty-sixth subdivision of section 5 of the act uses unusually strong language. Part of respondent's argument on this point is based on section 7 of the act, and will be referred to later. As an illustration of the firmness with which the principle here in issue is held to by the courts in cases similar to this, we note the case of *People*

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Opinion of the Court—STILES, J.

*v. Toal*, 85 Cal. 333 (23 Pac. Rep. 203). The constitution of the State of California has substantially the same provisions with regard to courts and the charters of cities of the higher grade as that of Washington. But it is there provided that a charter adopted by a city must be submitted to, and have the approval of the legislature without power of amendment before it becomes operative. The city of Los Angeles adopted a charter which, upon its submission to the legislature, was approved by a joint resolution of both houses. The charter provided for a police court, and upon a hearing similar to this, the supreme court held the provision establishing the court to be void on the grounds that the power to create such courts was vested in the legislature; that under the constitution, to create an inferior court, there must be a law passed in regular form, and approved by the governor; that the legislature could pass laws by bill only; and that a joint resolution was not a law, in the sense required. That would seem to be a much stronger case than the one at bar; and that decision was rendered in full view of *People v. Hoge*, 55 Cal. 612, which held that the article of the constitution conferring upon certain cities the power to make their own charters was self-executing.

But now, inasmuch as the seventh section of the act of March 24, 1890, is in these words: "Any city adopting a charter under the provisions of this act shall have all the powers which are now or may hereafter be conferred upon incorporated towns and cities by the laws of this state, and all such powers as are usually exercised by municipal corporations of like character and degree, whether the same shall be specifically enumerated in this act or not," respondent contends that the unnamed "powers" thus conferred include the power to provide a court of the character of the one in question, since the same legislature, by the act of March 27, created police courts in cities of the second,

third and fourth classes. Reverting to the last clause of § 7 first, we can see no possible way to give it any force whatever. By what standard could it be said that we should judge what are the powers “usually exercised by municipal corporations of like character and degree?” The powers of municipal corporations are only those expressly conferred, or those necessarily implied from those expressly conferred. Are the statutes of our own state and the rulings of its courts to be taken as the standard; or shall we go abroad? And where abroad? Is it the powers usually exercised by such corporations in New York or New Mexico that we shall regard? It is, we believe, usual to give to the larger cities everywhere some tribunal for the disposition of offenses against their ordinances; and it is usual to provide for the tribunal in the law or charter governing the cities; but it is almost universal for the legislature to establish the courts in question by some positive enactment. This, too, is the course followed in this state, unless cities of the first class are an exception; but were it not so, it would be a marvelous stretch of implied legislation to hold that because cities in other states were given such courts by their legislatures, by the language in discussion our legislature intended, in that manner, to waive all ceremony and establish inferior courts here. In fact, the legislation would be accomplished by our decision, and not by the law-making power of the state.

The last question is upon the first clause of section 7, and it is, whether, by the conference of “power” therein made, the cities of the first class may establish, or have already established, within them, such courts as are provided for in the act of March 27th. The legislature, treating section 10, article 11 of the constitution as not self-executing, in the act of March 24th, enumerated thirty-eight powers to be exercised by cities of the first class.

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Opinion of the Court — STILES, J.

Sections 38, 45 and 53 of the act of March 27th enumerated the powers of cities of the second class, and similar sections fixed those of cities of the third and fourth classes. The powers thus enumerated are to be exercised or not at the discretion of the municipal legislature; and it is so with every power delegated to a corporation of this kind. Other provisions of the same act enjoin duties which are in no wise discretionary. And still other sections provide for certain offices which must be filled in the manner laid down. But a court is created in those cities and exists from the moment of incorporation, without the will, and even against the wish of the corporation, with its jurisdiction and procedure established and ready for action as soon as a judge is elected or appointed as the case may be. Here certainly is no exercise of a "power" by the corporation. On the contrary, here is a branch of the state's sovereignty pertaining to the judicial power, established by positive law without the interference or consent of the corporation. What broader distinction from a corporate "power" could there be than this?

Now, the city of Tacoma has attempted to set up a court, whether by charter or otherwise makes no difference, in so far as a construction of section 7 is concerned, choosing as its model the police courts of cities of the second class, and if this is the exercise of one of the powers conferred by the general language of the section, it must be agreed that the power is availed of under precisely the same terms as it is conferred by the act of March 27th upon the other cities; that is, the court came into existence, charter or no charter, the moment the city became incorporated. But which court? The act of March 27th provided for three different police courts, each differing from the others in many respects; how is it to be decided which of the three was intended to be impliedly erected in cities of the first class? Rather, should it not be forced to

hold that all these courts were there? Which renders it scarcely necessary to pursue the absurdity further.

But again, since by § 7 cities of the first class are to have all the “powers” of other cities, why may not the analogy be extended to powers other than those referring to courts? If a court like that of a city of the second class is by force of the act established in cities of the first class, why not all the officials prescribed for cities of the second class, with like powers and duties? Yet an inspection of the charter of Tacoma shows a very great variance in this respect, without any reason or authority if the term “powers” were to have the meaning contended for. Upon all the grounds urged, therefore, we are satisfied that the respondent’s claims are not sustained.

The truth is that, whether by oversight, or mistake, or intention, we are not required to guess, the legislature in omitting to enact a general law for the incorporation and government of cities of the first class also failed to supply them with police courts, but left the administration of their criminal ordinances with the justices of the peace, where it had been for many years. It may well be that that body can easily be prevailed upon to supply the deficiency; but it is not within the province of this court to strain constructions to accomplish such an object without legislation.

It follows that we hold the police court of the city of Tacoma to have no legal existence, and that the petitioner is entitled to be released forthwith.

ANDERS, C. J., and DUNBAR, HOYT, and SCOTT, JJ.,  
concur.



Feb. 1891.]

Argument of Counsel.

[No. 68. Decided February 21, 1891.]

MORRIS WINDT v. JOHN BANNIZA AND MARTIN BANNIZA.

## ATTACHMENTS—MOTION TO DISCHARGE—PRACTICE—APPEALS.

A motion to discharge an attachment is addressed to the consideration of the court or judge, and the statute of this state (Laws, 1885-6, p. 45) does not contemplate the interposition of a jury to determine it, or to aid in its determination.

When the motion to discharge an attachment is made by defendant upon affidavits, the plaintiff may oppose the same by affidavits or oral testimony; but the defendant has no right, in the first instance, to introduce any testimony other than affidavits in support of his motion.

A motion to discharge an attachment on the ground of the insufficiency of plaintiff's affidavit therefor, should point out explicitly the nature of the insufficiency.

Affidavits used upon the hearing of a motion to discharge an attachment are not part of the record, and, in order to be available on appeal, must be brought up by a statement or bill of exceptions.

An attachment may be dissolved upon the motion and affidavit of but one of several defendants.

An order of the superior court discharging an attachment is not reviewable on appeal under the laws of this state for the removal of causes to the supreme court (Laws, 1889-90, pp. 333, 336).

*Appeal from Superior Court, Pierce County.*

The facts are fully stated in the opinion.

*Applegate & Tillow*, for appellant.

A motion based upon counter-affidavits as to grounds of attachment should not be sustained. *Reiss v. Brady*, 2 Cal. 132; *Cooper v. Reeves*, 13 Ind. 55. If plaintiff's affidavit and the other proceedings comply with the law, the attachment must continue in force. *Lord v. Gaddis*, 6 Iowa, 60. Issues should be made upon the facts alleged in the affidavit for attachment. *Foster v. Dryfus*, 16 Ind. 159; *Lowry v. McGee*, 75 Ind. 510; *Perry v. Sharpe*, 8 Fed. Rep. 22; *Strauss v. Abrahams*, 32 Fed. Rep. 311.

2	147
2	157
2	433
2	512

2	147
5	500
6	63
26*	189
32*	111
2	147
13	244

2	147
16	274
16	488

2	147
120	109

2	147
28	623

2	147
30	228

Questions pertaining merely to the mode of procedure may be tried upon affidavits, but it is contrary to all right to finally determine legal claims on motion and affidavits. *Parker v. Judge*, 24 Mich. 408; *Lyon v. Smith*, 66 Mich. 676. The code provides for the trial of all issues of fact by a jury, unless a jury trial be waived. Sec. 204. Our territorial supreme court was disposed to guarantee and insist upon the right thus provided for. *Meeker v. Gilbert*, 3 Wash. T. 378; *Baker v. Prewitt*, 3 Wash. T. 597.

The motion to dissolve the attachment on the ground "that the affidavit in the said cause is insufficient upon its face," is defective because it does not point out the irregularity or impropriety. *Freeborn v. Glazer*, 10 Cal. 339; *Loucks v. Edmondson*, 18 Cal. 204.

"The defendant's affidavit to falsify the facts contained in the plaintiff's affidavit should not be received. No provisions made by the code for superseding the attachment in this manner; and the well settled rule, independent of any statutory provision, is not to receive contradictory affidavits on questions like this." *Conklin v. Dutcher*, 5 How. Pr. 387; *White v. Featherstonebough*, 7 How. Pr. 358; *Klauber v. Charlton*, 47 Wis. 570.

"The law does not seem entirely clear that a partner may enter an appearance for his copartners without special authority, even during the continuance of the firm." *Hall v. Lanning*, 91 U. S. 166; *Hills v. Ross*, 3 Dall. 331. Upon the dissolution of the firm, as of necessity was the case here, all the assets having been disposed of, no authority can be found authorizing one partner to appear for or bind the other.

*Doolittle, Pritchard & Stevens*, for appellees.

The mode of traversing an attachment affidavit under our statutes is by motion and affidavits to be submitted to and tried by the court, and, under our practice, it is not

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Feb. 1891.] Opinion of the Court — ANDERS, C. J.

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contemplated that such an issue will ever be tried by a jury. Laws 1885-6, p. 45, §§ 31-3. The same practice prevails in Nebraska, Michigan, Alabama and Pennsylvania. *Grimes v. Farrington*, 19 Neb. 44 (26 N. W. Rep. 618); *Genesee Savings Bank v. Barge Company*, 52 Mich. 164 (17 N. W. Rep. 790); *Harmon v. Jenks*, 84 Ala. 74 (4 So. Rep. 260); *Holland v. White*, 120 Pa. St. 228 (13 Atl. Rep. 782).

That the writ of attachment in this case was properly dissolved upon motion of one partner, see *Sears v. Gearn*, 7 How. Pr. 383; *Holland v. White*, 120 Pa. St. 228 (13 Atl. Rep. 782); *Capehart v. Dowery*, 10 W. Va. 130. It has been held that a plea by one partner that he had not absconded, although admitting that the other party had absconded, was sufficient to work a dissolution of the writ of attachment against the firm property. *Leach v. Cook*, 10 Vt. 239; Drake on Attachment (5th ed.), § 53; *Bogart v. Dart*, 25 Hun, 395.

That none of the evidence upon which the hearing was had in the lower court has been brought to this court, and that nothing in the nature of evidence can be considered in this court upon appeal, we shall content ourselves with citing the following authorities: Code, 1881, § 464; Laws, 1883, p. 59; *Walsh v. Hutchings*, 60 Cal. 228; *Joyner v. Van Alstyne*, 20 Neb. 578 (30 N. W. Rep. 944); *Thompson v. Reno Savings Bank*, 19 Nev. 293 (9 Pac. Rep. 883); *Edwards v. Smith*, 48 Wis. 254 (3 N. W. Rep. 758); *Fish v. Benson*, 71 Cal. 428 (12 Pac. Rep. 454); *McLarty v. Prior*, Tex. Nov. 23 1886 (2 S. W. Rep. 752); *Pardy v. Montgomery*, 77 Cal. 326 (19 Pac. Rep. 530); *Barber v. Briscoe*, 8 Mont. 214 (19 Pac. Rep. 589); *McConnell v. Huntington*, 108 Ind. 405 (8 N. E. Rep. 620).

The opinion of the court was delivered by

ANDERS, C. J. — This was an action by appellant against appellees, who were partners, upon an account for goods, wares and merchandise sold and delivered. Before judg-

ment, plaintiff filed his affidavit and bond, and caused a writ of attachment to be issued and levied upon certain personal property alleged to have been fraudulently disposed of by defendants. The grounds for the issuance of the writ, as stated in the affidavit of the plaintiff, were— (1) that the defendants had disposed of their property with intent to defraud, hinder and delay their creditors; and (2) that defendants were guilty of a fraud in contracting a certain portion of the indebtedness mentioned in the complaint. One of the defendants appeared in the action and applied to the court upon motion, supported by his affidavit to discharge the attachment upon two grounds: (1) "That the affidavit in the said cause is insufficient upon its face;" and (2) "that the grounds for said attachment alleged in said affidavit are not true." The affidavit by the defendant in support of his motion, controverting the allegations contained in plaintiff's affidavit for attachment, was attacked by plaintiff for alleged insufficiency by motion to strike it from the files. The reasons assigned in the latter motion were that no facts were stated in said affidavit showing, or tending to show, that the attachment was improperly or irregularly issued, and that the facts therein set forth stated an issue triable by a jury, and which the plaintiff demanded to have so tried. The court overruled the motion to strike, and proceeded to hear the motion to discharge upon affidavits and counter-affidavits only. This action of the court is relied on by appellant as sufficient ground for the reversal of the order discharging the attachment; but we think the court committed no error in this proceeding. It is true that the issues raised by the pleadings in an ordinary action at law must be tried by a jury unless a jury is waived; but an attachment proceeding is not an action, but only a proceeding ancillary to an action, and does not in any manner affect the main issues in the case. A motion to discharge an attachment is addressed to the consideration of the court or judge, and our

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statutes does not contemplate the interposition of a jury to determine it, or to aid in its determination. The statute provides two methods by which an attachment may be discharged. One is by the defendant filing a bond, with sufficient sureties, to be approved by the officer having the attachment, or, after the return thereof, by the clerk, to the effect that he will perform the judgment of the court; and the other is by an application on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued. Laws 1885-86, p. 45, §§ 29, 31. And it is further provided that "if the motion be made upon affidavits upon the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the attachment was issued." *Id.*, § 32. The latter provision of the statute was followed in this instance by the court below; and this practice was approved by this court in the case of *Hansen v. Doherty*, decided at its last session, and reported in 1 Wash. 461 (25 Pac. Rep. 297). We are satisfied with that decision, except the closing portion thereof, wherein it is stated that "we see no reason why the defendant may not set forth specifically in his notice and motion the fact showing wherein the attachment was improperly issued, and prove the same by the testimony of witnesses before the court." This is an inaccurate statement, and liable to mislead. When the motion to discharge is made upon affidavits, the plaintiff may oppose the same by affidavits or oral testimony; but the defendant has no right, in the first instance, to introduce any testimony, other than affidavits, in support of his motion. The practice of hearing motions to dissolve attachments by the court, without a jury, upon affidavits and counter-affidavits, or other evidence, obtains in many of the

states. See *Holland v. White*, 120 Pa. St. 228 (13 Atl. Rep. 782, 783); *Grimes v. Farrington*, 19 Neb. 44 (26 N. W. Rep. 618); *Genesee Co. Sav. Bank v. Michigan Barge Co.*, 52 Mich. 164 (17 N. W. Rep. 790, and 18 N. W. Rep. 206); *Hardesty v. Campbell*, 29 Md. 533; *Baer v. Otto*, 34 Ohio St. 11; Drake, *Attach.* (6th ed.), §§ 401–403.

It is insisted by appellant that that part of defendant's motion based on the ground "that the said affidavit in the said cause is insufficient upon its face" states no fact, and that it is but a conclusion; and we think the view of counsel in that particular is correct, and, if that had been the only ground of the motion, it would have been manifestly insufficient. The insufficiency of plaintiff's affidavit should have been distinctly and explicitly pointed out, so as to have enabled him to avail himself of the right of curing by amendment any defects appearing in his affidavit or bond.

Appellant further contends that, even if it be conceded that the court below did not err in hearing the motion to discharge the attachment upon affidavits, still the proof shows that the attachment ought to have been sustained; but, in answer to that contention, it is only necessary to remark that there is in the record neither a certified statement of facts nor a bill of exceptions, and that there is, therefore, no evidence properly before us. The statute makes the bond of the defendant for the return of attached property a part of the record, but not the affidavits used on the hearing upon the motion to discharge. The latter, to be available on appeal, must be brought up as other facts, by a statement or bill of exceptions. *Fish v. Benson*, 71 Cal. 428 (12 Pac. Rep. 454). Besides, if we concede that the transcript contains all the testimony, we nevertheless cannot say that the ruling of the court was not warranted by the evidence. Appellant also contends that in no event should the attachment have been dissolved upon the motion and affidavit of but one of the defendants.

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The practice, however, is sanctioned by authority, and we see no reason for holding to the contrary. See Drake, *Attachm.* (6th ed), § 53; *Holland v. White, supra*.

But there is a jurisdictional question involved in this controversy, which, though not raised by counsel in this proceeding, ought to be considered. It is whether the order appealed from can be reviewed by this court, and a negative answer will be decisive of this appeal. Our statute for the removal of causes from the superior to the supreme court, as amended March 22, 1890, provides that an appeal may be taken to the supreme court from the superior courts "in all actions and proceedings," with certain exceptions and limitations, not pertinent to the question now before us. See Laws 1889-90, pp. 333, 336. And we are of the opinion that the word "proceedings," in contradistinction to "actions," must be taken to include not the orders of the court in matters arising in the progress of the action, or merely incident or ancillary thereto, but only those matters outside of ordinary actions, and commonly known as "special proceedings." We cannot think that the constitution of the state, which is in substantially the same language as to appeals as the statute, contemplates the review by this court, at least without express legislation, before final judgment, of orders discharging or sustaining attachments, or of any other orders not affecting the merits of the action. The supreme court of California, having before it an appeal from an order refusing to dissolve an attachment, says: "The attachment is merely a proceeding ancillary to the action, by which a party is enabled to acquire a lien for the security of his demand by a levy made before, instead of after, the entry of judgment. This ancillary proceeding may be taken at the time of the commencement of the action or at any time afterwards. Neither the action nor the judgment, under our law, in any manner depends upon the attachment,

although the attachment depends upon the judgment. The judgment in the case is precisely the same whether the attachment is dissolved or not. In those states where the attachment is used as a process for acquiring jurisdiction, the consequences of dissolving or refusing to dissolve an attachment might be different." *Allender v. Fritts*, 24 Cal. 447. The appeal in that case was dismissed on the ground that it was not warranted by the statute, and we think the language used by the court is peculiarly applicable to the case now before us. We are aware that appeals from orders discharging or sustaining attachments are provided for by statute in some of the states; and it may be said that our statute is broad enough to cover such cases. Our reply is: It is broad enough, but too indefinite. Taken in a literal sense, it would permit an appeal from any and every interlocutory order and decision made in the progress of an action. Ordinarily speaking, every step taken in an action is a proceeding; and, if every proceeding were appealable, then this court might be compelled to sit in judgment upon the ruling of the lower court in changing the place of trial of an action, or in overruling a demurrer. We do not believe the legislature intended that the word should be understood in any such sense. But we do believe that the court should not depart from the well known and established principles of the common law, and permit a cause to be brought before it by piecemeal for review, unless clearly authorized so to do by legislative enactment. It is true, we entertained a similar appeal in the case of *Hansen v. Doherty*, above mentioned; but in that case the question of jurisdiction, not having been raised or considered, was not passed upon by the court. The order of the court below not being reviewable by this court, the appeal must be dismissed at the cost of appellant.

STILES, DUNBAR, and HOYT, JJ., concur.

SCOTT, J., concurs in the result.



Feb. 1891.]

Argument of Counsel.

[No. 119. Decided February 24, 1891.]

HENRY H. CLINE v. F. S. HARMON &amp; Co.

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2	164
2	165

## ARREST IN CIVIL ACTIONS—APPEAL.

An order of arrest in civil actions is not a special proceeding, but is a provisional remedy, merely ancillary to the action in which it is invoked, and consequently not appealable under the act (Laws 1889-90, pp. 333, 336) providing that "an appeal may be taken to the supreme court from the superior courts in all actions and proceedings," as the term "proceedings" embraces only special proceedings, as distinguished from ordinary actions at law. (SCOTT, J., dissents.)

*Appeal from Superior Court, Pierce County.*

The facts are fully stated in the opinion.

*John C. Stallcup*, and *Joseph Sessions*, for appellant.

*Marshall K. Snell*, for appellees.

The constitution (article 4, § 4) and the act relating to the removal of causes (Laws 1889-90, pp. 333, 336) provide for appeals "in all actions and proceedings" with a limitation therein mentioned. In the modern codes of procedure, all judicial remedy is sought either in an "action" or a "proceeding." Each term is exclusive of the other. The "proceeding" here referred to covers application for relief not included in an ordinary proceeding, such as proceedings under the insolvency law, condemnation proceedings, *habeas corpus*, *quo warranto*, and the like. Arrest is a provisional remedy in and a part of an action. It is not a special proceeding. *Snively v. Abbott Buggy Co.*, 36 Kan. 106 (12 Pac. Rep. 522); *Burch v. Adams*, 40 Kan. 639; *Boyd v. Cook*, 40 Kan. 675 (20 Pac. Rep. 477). Even if the "proceeding" referred to in the constitution and statute were held to apply to the steps taken to secure the various minor securities, conveniences and remedies incident to the conduct of an ordinary action, still, under the most liberal

construction and greatest conceivable latitude, appeals would be allowed only from such rulings as go to the merits, and are final in the so-called proceeding. An order refusing to vacate a warrant of arrest is discretionary with the court, does not involve the merits of the action, and is not final, even in the provisional remedy. *Little v. Morris*, 10 Tex. 263; *Whiteley v. Davis*, 20 Neb. 504 (31 N. W. Rep. 74); *Miller v. Berry*, 13 Tex. 208; *Wilson v. Shepherd*, 15 Neb. 15 (16 N. W. Rep. 826); *Hobbs v. Beckwith*, 6 Ohio St. 252; *Allen v. Tyler*, 32 N. J. Law, 499; *Leitensdorfer v. Webb*, 20 How. 176; *Snowden v. Dorsey*, 6 Har. & John. (Md.) 94; *Morton v. Hood*, 12 Fed. Rep. 763; *Pentecost v. Magahee*, 4 Scam. (Ill.) 326; *State v. Wood*, 23 N. J. Law, 560; *McKim v. Thompson*, 1 Bland, 150; *Rowley v. Van Benthuyzen*, 16 Wend. 381; *Allender v. Fritts*, 24 Cal. 447; *Buel v. Street*, 9 Johns. 442; *Hottenstein v. Conrad*, 5 Kan. 253; *Clason v. Shotwell*, 12 Johns. 31.

The opinion of the court was delivered by

ANDERS, C. J.—This was an action by appellees against appellant in the court below for the recovery of \$168, upon an account for goods sold and delivered. The defendant in his answer denied owing the plaintiffs the amount claimed, but admitted an indebtedness of \$115. At about the time the defendant's answer was filed the plaintiffs filed a bond and affidavits, and caused an order and warrant of arrest to issue, upon which the defendant was arrested and held to bail in the sum of \$300. The defendant moved the court to vacate the order of arrest for the reasons, as alleged, that there was no law authorizing arrest and imprisonment in civil actions before judgment; that the proof upon which the order was issued was insufficient, and showed no pertinent facts; that the bond for arrest was defective, and that the allegations upon which the order was issued were untrue. The motion was denied by the

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Feb. 1891.] Opinion of the Court—ANDERS, C. J

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court, and the defendant, before final judgment in the action, appealed to this court, and assigns the ruling of the court in granting the order of arrest and in refusing to vacate the same as error. Counsel for appellees move to dismiss the appeal upon two grounds: (1) That the order from which the appeal is sought to be taken is not appealable, and the court is without jurisdiction; and (2) that the action in which said order was made is a civil action at law for the recovery of money where the original amount in controversy does not exceed the sum of \$200, and the action does not involve the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute.

Whether this court has jurisdiction to hear and determine the question now before it, must depend upon the construction to be given to the statute in reference to appeals. The act of the legislature concerning the removal of causes from the superior courts to the supreme court (as amended March 27, 1890), following substantially the language of the state constitution, provides that "an appeal may be taken to the supreme court from the superior courts in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or property when the original amount in controversy or the value of the property does not exceed the sum of two hundred (200) dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute." In the case of *Windt v. Banniza*, ante, p. 147, recently decided by this court, and which was an appeal, before final judgment, from an order discharging an attachment, we had occasion to interpret the meaning of the word "proceedings" as used in the statutes, and we then held it did not embrace those proceedings merely incident to an action and not affecting its merits, but only those known as special proceedings, as distinguished from ordinary actions at law. The appeal in that case was dismissed for want

of jurisdiction in the court to review the alleged errors; and as it is evident that arrest and bail is a provisional remedy only, and not a special proceeding, and like an attachment merely ancillary to the action in which it is invoked, it follows that this appeal should likewise be dismissed. While it seems more harsh and oppressive to arrest an individual than to seize his property, still that is no sufficient reason, in the absence of more specific legislation upon the subject, for drawing a distinction as to the right of review by this court between orders denying or sustaining motions to dissolve attachments and those refusing to vacate orders of arrest. Our conclusion is in accordance with the view of the supreme court of Kansas, as announced in the case of *Burch v. Adams*, 40 Kan. 639 (20 Pac. Rep. 476), in which the precise question was before the court. See *Allen v. Tyler*, 32 N. J. Law, 499; *Clason v. Shotwell*, 12 Johns. 31. If, as appellant alleges, there is no law authorizing arrests in civil actions in this state, and he has been illegally deprived of his liberty, he is not without the means of redress, but we can afford him no relief at this time. For the foregoing reasons, the appeal must be dismissed at the cost of appellant.

HOYT, DUNBAR, and STILES, JJ., concur.

SCOTT, J. (*dissenting*). — I dissent. While the order of arrest and its prosecution were in a measure incidental to the main action, yet it was substantially an independent proceeding, and no error committed therein would afford any ground for reversing, or affect the judgment rendered in the suit. It is urged that if the door is open to such appeals there is no place to draw the line; that an order overruling or sustaining a demurrer and other like matters would also be appealable; that it would practically allow a separate appeal from every order made in the progress of a cause, etc. While I do not undertake specifically to

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enumerate every proceeding in which I think a party is entitled to an appeal, it seems to me a line can be drawn excluding everything founded upon matters litigated in the suit, and upon which the judgment is based, as such matters injuriously affecting a party can be reviewed by appealing the action. Such an interpretation would give an appeal in every matter affecting a substantial right, and I believe this to be a fair interpretation of the statute. An attachment proceeding should be held appealable, or the matters relating thereto should be determined by the judgment in the action in finding that a ground existed therefor, and directing a sale of the property so seized, or otherwise, according to the facts, so that the same could be reviewed upon an appeal from such judgment, and the judgment reversed or modified, if error existed in such proceeding to the prejudice of the party appealing. A finding therein upon a question of fact would not be reviewed, but an entire absence of proof upon some essential point would be fatal. Also in the matter of a preliminary injunction or restraining order addressed to the sound discretion of the court an appeal should be held to lie, so that a reversal or modification might be had in case of a clear abuse of such discretion. Such other proceedings as are entirely unconnected with any action are essentially actions in themselves, though, perhaps, not technically so. The authorities bearing upon the right to such appeals are conflicting. The greater number of cases may sustain the position taken by the court here. It is a question upon the construction of a statute, however, which we have before us, and such cases were based on constitutional or statutory provisions differing from ours, with possibly an exception of one or two, where there may have been no substantial difference in the language used. Whether they were passed as amendments, and what the previous situation was, is not apparent, and these matters are always

considered in interpreting or construing statutes. Although great respect should be paid to cases elsewhere decided pertinent to the question, more should be given to principle, clearly cut; and there is little danger in recognizing one so plainly delineated as the one upon which this appeal is founded. A person illegally restrained of his liberty should certainly be entitled to a hearing and deliverance. I think it must be held to be within the intention of the law to allow him an appeal, and that the statute is sufficiently definite for such purpose. Section 1, Session Laws 1889-90, p. 333, which the present statute amended, reads as follows:

“An appeal may be taken to the supreme court from the following decisions, orders or judgments of superior courts, and from none other: (1) From all final decisions; (2) from a final order made in special proceedings affecting a substantial right therein, or made on a summary application in an action after judgment; (3) from an order granting a new trial, or granting or refusing, continuing or modifying a temporary injunction or restraining order in cases where the principal object of the action is to obtain injunctive relief; (4) from a final order or judgment on *habeas corpus*.”

The statute in question (*id.* p. 336) amends the said section to read as follows: “An appeal may be taken to the supreme court from the superior courts in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or property when the original amount in controversy or the value of the property does not exceed the sum of two hundred (200) dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute;” following the constitutional provision, § 4, art. 4, State Const. It seems to me there is more reason for holding that the last act was intended to enlarge, rather than restrict, the matters from which appeals might be taken as provided in the former statute. These acts

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were both passed by the same legislature. The first act specified certain matters from which appeals might be taken, and excluded all others. The restrictory words, "and from none other," and the specification, are omitted from the last act, and an appeal is therein allowed in all actions and proceedings; the act only containing the constitutional restriction regarding the amount in litigation, which, of course, operated upon the former statute. Herein the only restriction placed upon appeals—and this should have considerable weight in determining what is allowed—is as to matters connected with the amount involved where the sum claimed or the value of the property does not exceed \$200, and nothing else is limited; otherwise, an appeal may be taken. See *Conant v. Conant*, 10 Cal. 249 (70 Am. Dec. 717). Section 2 provides that "a person desiring to appeal from any such decision, order or judgment, may, by himself or attorney, give notice," etc. Had it been intended to narrow the scope of the former act, and exclude some of the matters from which it allowed an appeal, it is likely such an intention would have found expression in more appropriate language. On the other hand, quite likely, it was feared that some matters wherein an appeal should properly lie had been omitted from the former provisions, and that it was the intention to go to the fullest extent permissible under the constitutional limitation, leaving this general provision for the court to apply. The words "an appeal" are equivalent to one appeal in each action and proceeding wherein a substantial right is affected by a final decision therein. Consequently, any such prejudicial matter affecting a substantial right that would come up in an appeal of the main action could be passed upon in such appeal, and it is evident that a separate appeal therefrom was not intended; but that in all others, whether in a proceeding connected with an action or in an entirely independent proceeding, an appeal might be had. This is only a fair interpretation,

calculated to give effect to the act, and could not be deemed what is sometimes called "legislation by the court" in any sense. Such an interpretation does not go beyond the recognized authority or duty of courts, and in this view the statute is sufficiently definite.

Our constitutional and legislative provisions for appellate jurisdiction are liberal. The single bare exclusion relating to money values of \$200 or less is practically so insignificant that the citizen may feel safe and secure in all his valuable rights; and if, by such a proceeding as this, his home is invaded, and he is carried to prison, that he may have a review thereof on an appeal to the supreme court, after a final decision in the proceeding. The proceedings in arrest in this case were wholly unwarranted. Section 17, art. 1 of the state constitution provides that "there shall be no imprisonment for debt, except in cases of absconding debtors." This rendered the statute (see chapter 9 of the code) under which these proceedings were had, nugatory. There is no provision there, and there was none elsewhere, by statute authorizing the arrest of absconding debtors before judgment. This case presents peculiar hardships. A judgment on the sole issue formed by the complaint in this action founded upon an account amounting to less than \$200, and the answer admitting the greater part thereof, would come within the limitation referred to. It could not be brought here for review, and in no event could that judgment affect the wrong that this judgment has inflicted. The judgment brought here for review is one given in a statutory proceeding, instituted and carried to the final ending under a statute which was at the time void; a judgment that declared the arrest and imprisonment which the appellant had suffered to be lawful, and declared the statute under which the proceedings were had to be valid; a proceeding that cannot be commenced nor carried on except by force and virtue of statutory law. This proceeding and



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this judgment involved not the matter of one or two hundred dollars. All that it involves is distinctly different from that. It involves that which is most sacred and dear to the citizen: Therein the freeman is made a prisoner, the citizen a victim to violence and outrage. This judgment is a final one in the proceeding, and ripe for review. The amount for which an action has been brought and judgment may be given is entirely immaterial, so far as imprisonment proceedings are concerned, for the wrong of an imprisonment is the same whatever the amount involved in the action. The validity of this statute could not be involved in the judgment upon the debt demand in the complaint stated, even if that demand and judgment thereon were large enough to warrant an appeal therefrom, for the statute affected the proceeding only — the order and warrant in arrest. Furthermore, it is provided that the appeal from any order, decision or judgment must be taken within six months after its rendition. More than six months may elapse between the judgment on the arrest proceedings and the judgment on the debt demand, so that it must be apparent from every point of view that this judgment on the issue involved in the arrest and imprisonment proceedings is in every way a distinct judgment affecting such rights as make it a judgment that can be reviewed here. Such an appeal is inherently right in principle, and, I believe, in accord with the conception of the framers of our constitution, and within the expression thereof and our legislative enactments thereunder. According to the holding in this case, a party would in some proceedings have no remedy for error; an action on a bond could not be held to be one; and *habeas corpus*, while available in a proceeding like this, where the person is seized and detained in custody, sometimes might not lie or afford any relief, as, for instance, where bail had been given. Under the law relating to the writ applicable to this court it, when issuable, would not

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Opinion of the Court — ANDERS, C. J.

[2 Wash.]

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reach beyond one jurisdictional question — the bare power to issue the warrant. No other error could be raised by it. See *In re Lybarger*, ante, p. 131 (25 Pac. Rep. 1075), decided at this session. It has been the policy of other states to grant appeals in such proceedings. See *Wright v. Brown*, 67 N. Y. 1; *Morris v. Talcott*, 96 N. Y. 100. Also, see *Spitley v. Frost*, 15 Fed. Rep. 299. The motion to dismiss the appeal should have been denied, and the defendant discharged.

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[No. 120. Decided February 24, 1891.]

HENRY H. CLINE v. TACOMA STOVE CO.

*Appeal from Superior Court, Pierce County.*

*John C. Stallcup*, and *Joseph Sessions*, for appellant.

*Marshall K. Snell*, for appellees.

ANDERS, C. J. — This case presents for our consideration the identical questions which were involved in that of *Cline v. Harmon*, ante, p. 155 (just decided by this court), and for the reasons given in the opinion filed in that case, the appeal must be dismissed at the cost of appellant.

HOYT, DUNBAR, and STILES. JJ., concur.

SCOTT, J., dissents.

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Syllabus.

[No. 121. Decided February 24, 1891.]

HENRY H. CLINE v. J. A. BURRICHTER &amp; Co.

2 165  
3 137*Appeal from Superior Court, Pierce County.**John C. Stallcup, and Joseph Sessions, for appellant.**Thad. Huston, and Marshall K. Snell, for appellees.*

ANDERS, C. J.—This cause presents for our consideration the identical questions which were involved in *Cline v. Harmon, ante*, p. 155 (just decided by this court), and for the reasons given in the opinion filed in that case, the appeal must be dismissed at the cost of the appellant.

HOYT, DUNBAR, and STILES, JJ., concur.

SCOTT, J., dissents.

[No. 122. Decided February 25, 1891.]

DEXTER HORTON & Co., *Bankers*, v. J. M. SPARKMAN,  
D. A. McDONALD, WILLIAM RIECHERS, WILLIAM  
KEMERY, AND W. B. MORRIS.2 165  
2 1712b 165  
4 170  
25\*1070  
29\*1049

LIENS—MANUFACTURING LUMBER—NOTICE—DESCRIPTION—  
VERIFICATION—DEFAULT—JUDGMENT.

2b 165  
6 196  
6 198  
6 345  
6 484  
25\*1070  
33\* 395  
33\* 396  
33\* 826  
33\*10692b 165  
9 321  
25\*1070  
37\* 3222b 165  
10 87  
11 206  
25\*1070  
38\* 857  
39\* 4522b 165  
24 603  
24 6042 165  
Case 2  
27 3382 165  
Case 2

A notice of claim of lien "for labor performed in manufacturing lumber," which describes the lumber as "being about 100,000 feet which was manufactured in Kitsap county, Washington state, and which is marked thus ———, and is now lying at the saw-mill owned by said Builders' Material Co. in Kitsap Co., the same being the place where said lumber was manufactured, and situated about two miles south of Port Blakely, on Puget Sound," complies with the statute giving a lien for "manufacturing saw-logs into lumber," and requiring a description of the property "sufficient for identification with reasonable certainty."

The lien given by statute is personal to the laborer; and where the laborer combines with his own claim one assigned him by another laborer, he loses all right to take benefit of the foreclosure.

No lien is given by statute for the manufacture of shingles, and where the notice is for manufacturing lumber and shingles, without showing how much is due for labor on the lumber and how much on the shingles, the whole lien fails.

Where a claim of lien is verified by another than the claimant, a verification to the effect that he believes it to be true is sufficient.

Where plaintiffs allege in their complaint that they had filed a lien upon certain lumber and shingles, but the copies of liens forming part of the complaint show that liens were not claimed upon the shingles, the answer of defendant specifically denying all the allegations of the complaint, and setting up as a new defense that the shingles were cut and sawed from shingle bolts made by other parties than the plaintiffs, to which plaintiffs file no reply, does not entitle defendant to judgment on the pleadings.

It is error to render judgment against a party who makes default before the default has been entered.

Although the owner of the lumber and shingles may have made default, the holder of a chattel mortgage thereon, impleaded as defendant, who has answered denying all the plaintiffs' allegations, is entitled to a trial.

A judgment awarding liens on the shingles not mentioned in the claim of lien is erroneous.

*Appeal from Superior Court, Kitsap County.*

Action by J. M. Sparkman and others to foreclose liens on certain lumber and shingles, the property of the Builders' Material Company. Dexter Horton & Co., bankers, are made defendants, because they hold a chattel mortgage on said lumber and shingles, which plaintiffs claim is subject to their rights therein.

*McGilvra, Blaine & De Vries*, for appellant.

The description in the notice of lien is not sufficient to identify with reasonable certainty the property to be charged with the lien. *Wheeler v. Port Blakely Mill Co.*, 2 Wash. T. 71; *Washburn v. Russel*, 1 Pa. St. 499. The lien notice of Wm. Kemery includes labor other than his

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personal labor, and for which he can claim no lien. Such works a corruption of his whole claim. 2 Jones, Liens, §§ 724, 1413; *Wheeler v. Port Blakely Mill Co.*, 2 Wash. T. 71; *Mohr v. Clark*, 3 Wash. T. 440; *Stubbs v. Railroad Co.*, 65 Iowa, 513; *Quimby v. Hazen*, 54 Vt. 132; *Hoffman v. Walton*, 36 Mo. 613.

*I. A. Murchison*, for appellees.

The opinion of the court was delivered by

STILES, J.—Five plaintiffs—J. M. Sparkman, D. A. McDonald, William Riechers, William Kemery, and W. B. Morris—joined in an action to foreclose laborers' liens on certain lumber and shingles, situated at the saw-mill of the Builders' Material Company, in Kitsap county. The Builders' Material Company was made a party to the action, and was served with process, but it made no appearance. Dexter Horton & Co., bankers, a corporation, appeared, and demurred to the complaint and each of the separate causes of action therein stated, on the ground that no cause of action was stated. Copies of the several liens were annexed to and made a part of the complaint. The action was brought under § 1947 of the code. Each of the liens was in substantially the following form:

"Notice is hereby given that ————, of Kitsap county, Washington state, claims a lien upon all lumber, being about 100,000 feet, which was manufactured in Kitsap county, Washington state, and which is marked thus ————; and is now lying at the saw-mill owned by said Builders' Material Co., in Kitsap Co., the same being the place where said lumber was manufactured, and situated about two miles south of Port Blakely, on Puget Sound, for labor performed upon and assistance rendered in manufacturing lumber." (Other clauses followed.)

We are of the opinion that this description was sufficient, as against the objection of appellants that the place was

not sufficiently located, that the lumber had no marks, and that it is not stated that the logs were manufactured into lumber. It is not usual, we think, to mark lumber; and, as the lien can only be taken upon lumber while still at the mill, it must be left to the proofs to show labor on the lumber upon which it is proposed to establish the lien. Of necessity liens of this class must be less definite than those upon real property, or no effect could be given to the statute. A mill which is "about two miles south of Port Blakely, on Puget Sound," ought to be easily found. That one who manufactures lumber manufactures it out of logs would seem to be so nearly a violent presumption that it would not be necessary to say it in more abundant language than that used.

The notice of William Kemery alleged his own claim of \$32.50, with an offset of \$20.80; and it also alleged that the Builders' Material Company was indebted to G. M. Kemery in the sum of \$51.25, with an offset of \$33.42, which indebtedness had been assigned to claimant. William Kemery claimed a lien for both balances in the gross sum of \$29.63. This he could not do. The lien given by statute is personal to the laborer; it does not run with the chose in action. Having perfected his lien, and thus entitled himself to the equity, an assignment of the debt might entitle the holder to the enforcement of the security thus obtained. There has been much discussion and diversity of opinion among courts and writers on this subject of the assignment of claims and the right of assignees to perfect liens to secure them; but we think the rule announced is the better one under our present statute. Having confused the two demands, plaintiff failed to comply with the statute, and lost all right to take benefit of the foreclosure.

The lien of J. M. Sparkman was like the others, excepting it was for labor in manufacturing the 100,000 feet of lumber and 300,000 shingles, at wages of \$3 per day for

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thirty-three days. No lien is given by statute for the manufacture of shingles unless we hold that shingles are included in the term "lumber." We do not think the statute was intended to cover such an interpretation. It gives a lien only to those persons who labor upon or assist in "manufacturing saw-logs into lumber," which, we take it, means the grosser operation of converting logs into timbers, planks and boards. There could, therefore, be no lien for such part of the plaintiff's labor as was applied to making shingles, and as there was in the claim nothing to show how much was due for labor on the lumber and how much on the shingles, the whole lien failed.

The claim of W. B. Morris was verified by P. A. Ellsworth, to the effect that he believed it to be true. The statute seems to require no statement by the person verifying an instrument of this kind for another of the facts upon which he bases his belief, and lays down a form which may be used. We think the verification was sufficient.

The appellant, after the overruling of its demurrer, in the court below, filed an answer specifically denying the allegations of each cause of action stated in the complaint, and setting up that the shingles made by the Builders' Material Company were cut and sawed from shingle bolts made by other parties than the plaintiffs. The plaintiffs filed no reply to the new matter, and defendant moved for judgment on the pleadings. The court denied the motion, and, we think, properly, except as to the claim of Sparkman. It is true that in his complaint, each of the plaintiffs alleged that he had filed a lien upon all the lumber and shingles at the mill, but the copy of his lien, filed as a part of the complaint, showed how far this was untrue; and, in the absence of any motion to correct the pleadings, that part referring to shingles was to be disregarded on a motion for judgment.

Immediately upon the disposal of the defendant's motion

for judgment, the court, without setting the cause for trial, or hearing any proofs, and before any default of the Builders' Material Company had been entered, examined the plaintiffs' liens, and entered up judgment against the Builders' Material Company for the full amounts claimed, decreeing the lumber and shingles to be sold. This was error. The default of the Builders' Material Company should have been entered before any judgment was rendered against it. And the defendants, Dexter Horton & Co., bankers, having answered, denying all the plaintiffs' allegations, had a right to have the case set down for trial regularly, to cross-examine witnesses, and to contest the sufficiency of the proofs.

The judgment was also erroneous in that it awarded liens to all the plaintiffs upon the shingles, whereas only the lien of Sparkman mentioned shingles. The judgment is therefore reversed, with instructions to the court below to sustain the demurrer to and dismiss the complaints of William Kemery and J. M. Sparkman, and to set down for trial and try the cause involving the other parties. Costs to appellant.

ANDERS, C. J., and DUNBAR, J., concur.

HOYT and SCOTT, JJ., not sitting.



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[No. 123. Decided February 25, 1891.]

DEXTER HORTON & Co., *Bankers*, v. R. J. WILEY *et al.*

2	171
6	196
26*	1071
33*	395
2	171
40	201

LIENS—MANUFACTURING LUMBER—NOTICE OF CLAIM—  
DESCRIPTION.

Under Code, 1881, § 1947, which requires a description of the property sought to be charged with a lien sufficient for identification with reasonable certainty, a claim of lien which describes the property as “a quantity of lumber, being about 70,000 feet, now lying at the defendant’s saw-mill in said county, is insufficient.

*Appeal from Superior Court, Kitsap County.*

The facts are sufficiently stated in the opinion.

*McGivra, Blaine & De Vries*, for appellant.

*I. A. Murchison*, for appellees.

The opinion of the court was delivered by

STILES, J.—The plaintiffs in this action, R. J. Wiley, C. W. Wiley, Harry Wiley, E. P. Wand, J. H. Snowden, Chris. Wyman, Thomas J. Caskey and C. Brownlee, sought to foreclose laborers’ liens upon the same lumber as did the plaintiffs in *Dexter Horton & Co. v. Sparkman*, *ante*, p. 165. The pleadings, liens, and proceedings were the same as in the latter case, and for the reasons therein given, if there were no other defects, the same course would be pursued. But all the liens, excepting those of Wand and Snowden, were filed upon the shingles also, with no statements sufficient to show what portion of their labor was upon the lumber alone, which renders them incapable of enforcement. The claims of Wand and Snowden were not open to the objections above named, but the description was: “A quantity of lumber, being about 70,000 feet, . . . now lying at the defendant’s saw-mill, in said county.” We held in the other

case that the same description, with the addition, "being the place where the said lumber was manufactured, and situate about two miles south of Port Blakely, on Puget Sound," was sufficient, but cannot sustain this one. The statute (§ 1947) requires a description of the property to be charged with a lien, sufficient for identification with reasonable certainty; and there is a great difference between a location two miles along the shore of the Sound, below Port Blakely, and the entire county of Kitsap, when it comes to determining where the property lien was. Therefore, in this case, the order will be that the judgment be reversed, and the cause remanded, with instructions to the superior court to sustain the demurrer and dismiss the action. Costs to appellant.

ANDERS, C. J., and DUNBAR, J., concur.

HOYT and SCOTT, JJ., not sitting.

[No. 145. Decided March 4, 1891.]

TRADERS' BANK OF TACOMA, THE MERCHANTS' NATIONAL BANK OF TACOMA, BANK OF BRITISH COLUMBIA, AND REBECCA B. EWING v. F. D. VAN WAGENEN, C. E. SACKETT, AND WILLIAM PAGE, *Copartners, et al.*

INSOLVENCY — ATTACHMENT — FRAUD.

Under § 2022 of the Code of 1881, after the court, in insolvency cases, has made an order staying all proceedings against the debtor, the court has no authority to set aside the stay or allow attachment proceedings commenced against his property.

Under the laws of this state, after the institution of insolvency proceedings, all questions relating to the fraud of the debtor should be tried therein, and if the debtor is convicted of fraud he cannot obtain his discharge, nor the return of his estate, as that has become vested in the assignee for the benefit of his creditors.

2	172
5	670
6	41
26*	253
32*	792
33*	1009
2	172
9	456
26*	253
37*	673
2	172
16	364

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Argument of Counsel.

*Appeal from Superior Court, Pierce County.*

The facts are fully stated in the opinion of the court.

*Seymour, Griggs & Lockwood, Doolittle, Pritchard & Stevens, E. T. Dunning, and Effinger & Abbott, for appellants.*

The current of modern authorities is to the effect that a creditor having an attachment lien may maintain a creditor's bill, and especially where it is shown, as it is in this case, that he has exhausted all legal remedies and can take no further steps in a court of law, then a court of equity will interfere in his behalf. *Case v. Beauregard*, 101 U. S. 688; *Falconer v. Freeman*, 4 Sandf. Ch. 565; *Heyneman v. Dannenberg*, 6 Cal. 376 (65 Am. Dec. 519); *Scales v. Scott*, 13 Cal. 77; *Robert v. Hodges*, 16 N. J. Eq. 299; *Curry v. Glass*, 25 N. J. Eq. 108; *Tappan v. Evans*, 11 N. H. 311; *Russell v. Clark*, 7 Cranch, 89; *Edson v. Cummings*, 52 Mich. 52 (17 N. W. Rep. 693); *Shaw v. Dwight*, 27 N. Y. 244 (84 Am. Dec. 275); *Stephens v. Beal*, 4 Ga. 319; *Stone v. Anderson*, 26 N. H. 506; *Drake, Attachm.*, § 225; *Bump, Fraud. Conv.*, 524; *Perkins v. Fourniquet*, 14 How. 314; *Kahn v. Salmon*, 10 Sawy. 183 (20 Fed. Rep. 801), cited with approval in *Thompson v. Caton*, 3 Wash. T. 31.

*Judson, Sharpstein & Sullivan, for appellees C. E. Sackett, F. D. Van Wagenen, Rolla M. Sackett, and Eleanor V. Van Wagenen. William H. Reid, for appellees William and Sarah Ann Page.*

A creditor can file a bill to annul a fraudulent transfer only after the return of an execution unsatisfied, or in aid of an attachment after judgment. See *Wait, Fraud. Conv.*, § 81, and cases cited; *Weil v. Lankins*, 3 Neb. 384; *Tennent v. Battey*, 18 Kan. 324; *Martin v. Michael*, 23 Mo. 50 (66 Am. Dec. 656); *Greenleaf v. Mumford*, 19 Abb. Pr. 469;

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*Mills v. Block*, 30 Barb. 549; *Melville v. Brown*, 16 N. J. Law, 364; *Brooks v. Stone*, 19 How. Pr. 395; *Bigelow v. Andress*, 31 Ill. 322; *Thurber v. Blanck*, 50 N. Y. 80; *Brinkerhoff v. Brown*, 4 Johns. Ch. 671; *Griffin v. Nitcher*, 57 Me. 270; 3 Pom. Eq. Jur., § 1415, and notes.

The opinion of the court was delivered by

DUNBAR, J.—This is a suit in equity in the nature of a creditors' bill, brought by the plaintiffs in error in their own behalf against the defendants to obtain relief by having various conveyances, executed by the individual defendants F. D. Van Wagenen, C. E. Sackett, and William Page to their wives, set aside, canceled, and decreed to be fraudulent and void as against creditors. To this bill certain of the defendants, among them F. D. Van Wagenen and wife, C. E. Sackett and wife, and William Page and wife, demurred. It appears by the bill of complaint demurred to that the defendants F. D. Van Wagenen, C. E. Sackett, and William Page were copartners in trade under the firm name of the Buckley Lumber & Shingle Manufacturing Company, and as such copartners had become indebted by notes and accounts at different times to the plaintiffs, respectively, in different amounts. That said copartners owned property, both real and personal, as copartners, on the 22d day of January, 1890, at which time they executed and filed application to the superior court of Pierce county as "insolvent debtors" for a discharge from their debts, and made and delivered therewith an assignment of all their property; and an order staying all proceedings upon the part of their creditors was thereupon duly made by the court, and the usual order to show cause was made by the court and published, and a receiver to take charge of the property was duly appointed. Afterwards, upon application of the plaintiffs severally applying, said superior court set aside the stay of proceedings pre-

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viously ordered, and allowed each of the plaintiffs to commence an action at law upon their several notes and accounts, and to issue attachments against the assigned property and such other property of said insolvents as might be found. That afterwards, and under color of said attachments, the sheriff of Pierce county attempted to levy the same upon certain premises or lands of the defendant Sarah Ann Page, described in the complaint, which was land acquired previous to the formation of said copartnership by the joint labors of said William Page and Sarah Ann Page, his wife, which was held by them as community property until the 28th day of September, 1889, when a portion thereof was transferred by him to her for a valuable consideration, and on the 18th day of January, 1890, the remainder thereof was likewise sold and deeded to his said wife, who was then the sole owner. That after filing notice of levy of aforesaid attachments upon said premises, the plaintiffs, by leave of the court, upon separate motion filed the bill of complaint herein, to which defendants separately demurred. That said several individual actions at law, in which said several attachments were issued, have not been tried, and the plaintiffs have not obtained judgment in any of said actions, but have jointly filed the bill of complaint herein upon the same several alleged claims and indebtedness set forth for cause of action in each of said actions at law pending, and upon which said attachments were issued.

The grounds of demurrer alleged were "that the court had no jurisdiction of the persons of defendants or the subject-matter of the action; that there was another action pending between the same parties for the same cause; that several causes of action were improperly united in said complaint; that the plaintiffs had no legal capacity to sue; that there was a defect of parties defendant; that the complaint did not state facts sufficient to constitute a cause of

action.” Certain of the defendants also interposed motions to the complaint embracing substantially the same grounds of objection as set forth in the demurrer. There were two separate demurrers filed by counsel representing different defendants, but they raise substantially the same questions and will here be considered together. The demurrers were sustained by the court below, and an order made dismissing the bill of complaint. From this order plaintiffs have appealed to this court.

The constitutionality of the insolvent act is questioned in appellant's brief, but was practically abandoned in the oral argument of the case. No sufficient reason appears for pronouncing the law unconstitutional.

It is contended by appellees that an attachment lien before judgment is not a sufficient basis for an action in the nature of a creditors' bill. On the other hand, while it is conceded by appellants that formerly it was the generally recognized rule that a creditors' bill to set aside fraudulent conveyances could not be obtained until after judgment, the issuing of execution, and the return of *nulla bona*, yet it is contended that the current of authorities is to the effect that a creditor having an attachment lien may maintain a creditors' bill, especially where it is shown that he has exhausted all legal remedies; and many authorities are cited in support of both contentions. Whatever may be the law as to the general proposition, there is one element in this case that is not reached by the cases cited by the appellants; that is the question whether or not, conceding that a creditors' bill can be maintained by virtue of an attachment lien, it can be maintained against a defendant who has surrendered his estate for the benefit of his creditors under an insolvency law similar to the insolvency law of the Code of Washington, and especially by virtue of an attachment issued in an action commenced after proceedings in insolvency have been instituted. Several cases have

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been cited from New Jersey, but there the statute by special provision makes the levying of the attachment a lien for the equal benefit of all the creditors who shall apply to the court or to the auditor for that purpose, and holds the property of the defendant bound for the satisfaction of all the applying creditors. The case of *Kahn v. Salmon*, 10 Sawy. 183 (20 Fed. Rep. 801), is an Oregon case, and the attachment was issued prior to the assignment. Also under the laws of Oregon an attachment can only issue upon due proof of the plaintiff's claim (Code Civil Proc., § 143); and the court in the case cited commented upon that provision as follows: "As between the parties to the action, the fact of the indebtedness is thereby established until the attachment is vacated or discharged."

In this state no proof is required, and no presumption obtains that the claim of the attaching creditor is a valid one, but the writ issues by the clerk upon the filing of the affidavit and bond. It is admitted by the appellants that their only basis of action is their attachment lien, and they bring their action for the benefit of themselves and all other creditors who will join them in the action and share the expenses of the suit. Under this theory of the case, if the creditors not having attachment liens were to join them, there would certainly be a misjoinder of parties plaintiff; for those not having the attachment liens would have no legal capacity to sue in this action. On the other hand, if the creditors not having liens cannot come in, the result would be that the action of the court in allowing appellants' attachment proceedings would result in a discrimination against all other creditors, and that, when the assets were marshaled according to the prayer of the petitioner, the division could only be made between the creditors who were parties to the writ; and this is a result the obtaining of which the appellants in their argument disclaim. And this brings us to the investigation of a proposition lying at

the very threshold of the case, viz., the action of the court in allowing appellants' attachment proceedings after the institution of the proceedings in insolvency. Section 2022 of the insolvency act, under which these proceedings were had, provides that "when issuing the order for the meeting of the creditors the judge shall order that all proceedings against the debtor be stayed." This provision seems to be plain, imperative, and susceptible of no two constructions; and the only proviso is one necessary to make the act operative, viz., that the said stay of proceedings shall not prevent the judge who shall have granted it from appointing a receiver to take possession of all property of the debtor for the benefit of all his creditors, if one or more of his creditors shall apply, etc. Some force must be given to this mandatory provision of the statute, and the force to be given is the force expressed, viz., to stay the proceedings. The evident reason for this mandatory provision is to prevent a multiplicity of actions and the squandering of the estate in costs, until the question of the debtor's discharge is settled by the court; and there is no provision in any subsequent section of the act authorizing the court to set aside the stay commanded by § 2022, or to allow any other proceedings to be commenced; and, in the absence of such authority, the action of the court was illegal, and the attachment proceedings were void. Whatever may be the potency and effect of an attachment levied prior to the cession of the estate, we cannot understand upon what theory a court will allow an attachment to issue against property which is already under the control of the court. It is placed there by virtue of the insolvency proceedings for the benefit of all the creditors. Certainly, when property is placed in custody so high as this, it will not be subject to a scramble of the creditors to obtain liens upon it to the exclusion of the rights of other creditors. The usefulness of the court, by



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such a practice as this, would be entirely destroyed. With one hand it would attempt to destroy the very thing which the other hand was protecting. By such a practice, not only would the mandatory provision of § 2022 become a dead letter, but the whole object of the law would be thwarted. Courts are authorized to take charge of insolvent estates for the benefit of all the creditors, and not to create preferred creditors on *ex parte* applications or otherwise. The statute of insolvency, though possibly awkward in its expressions, is full and complete in itself; and it is evidently contemplated that all the questions relating to the fraud of the debtor should be tried in the insolvency proceedings.

Section 2033 provides that, in case after the appointment of said assignees any one of the creditors of the insolvent debtors should deem it necessary to oppose it on the ground of some fraud having been committed by the said insolvent debtor, or of the appointment not having been legally made, he shall, within ten days next following the appointment of said assignee, lay before the court or judge which has already taken cognizance of the case his written opposition, stating especially the several facts of nullity of the said appointment, or of fraud by him alleged against the insolvent debtor; whereupon, in case of accusation of fraud after having received said insolvent debtor's answer, the court or judge shall order a jury of not less than six men to be summoned in the same manner as jurors are summoned in the district court, for the purpose of deciding on the said accusation. Section 2034 provides for the proof of the notice. Section 2035 provides that, where the accusation is fraud, the creditor shall have a chance to interrogate the insolvent debtor on his oath concerning the state of affairs, and the several transactions in which he may have been engaged anterior to his failure, as he shall think proper, and the insolvent shall answer such interrogations,

etc. Section 2036 provides that "if the jury . . . declare in their verdict that said insolvent shall be guilty of fraud, the said debtor shall forever be deprived of the benefit of the laws passed for the relief of insolvent debtors in this territory." Thus it will be seen that the act itself points out specifically the manner in which the question offered is to be determined by the court. It is true that in the case of *Thomas v. Hilton*, 3 Wash. T. 365 (17 Pac. Rep. 882), it was held by a divided court that the provision for a jury of a less number than twelve was unconstitutional, but the same court gave effect to the finding of the judge on the testimony under the succeeding sections. The insolvency law is very different from a common-law assignment, and authorities cited to prove that the common-law assignments could be attacked collaterally by suits in equity are not in point. No other remedy was available. If the assignment was thought to be fraudulent, the proceedings were not in court, and there were no provisions made for the investigation of the question of fraud; but the insolvency law here was made for the benefit of both debtor and creditor. Nor do we think, as alleged by appellants, that they are unavailing to the creditors to obtain satisfaction of their claims. It is their object to protect as well the rights of the creditors as the debtor, and every investigation can be made, and every inquiry put on foot, in the insolvency proceeding that could be in a collateral suit. The assignee is the agent of the creditors. He is elected by them, is presumably in sympathy with them, and is their representative. They need not rest content with the property turned over by the debtor if they think he has not made a full return, but the assignee has power to bring all actions which may be necessary to be brought to protect the rights either of the insolvent or the creditors. See § 2027.

The last contention of the appellant is, that the insolvency law furnishes no remedy for the creditors, because, if

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the insolvency proceeding fail and the debtor is not discharged, the estate cannot be distributed among the creditors. On this proposition is cited § 2041 of the Code of Washington, and *Sanborn v. His Creditors*, 37 Cal. 609. We do not see in what way the section of the code referred to confirms this position. It simply provides that, if the debtor is convicted of a certain character of fraud, he shall be debarred of the benefit of this chapter. That simply means that he shall not obtain his discharge. It cannot mean that he cannot apply for the benefits of this chapter, for he has already applied. There is no provision or implication, however, that his estate shall be returned to him. If the California statute is the same as ours, we cannot indorse the conclusion arrived at by the court in the case cited. Section 2046 of the Code of Washington reads as follows:

“From and after the surrender of the property of the insolvent debtor, all property of such insolvent shall be fully vested in his assignee or assignees for the benefit of his creditors, and shall not be liable to be seized, attached, taken or levied on by virtue of any execution issued against the property of said insolvent; and the assignees who may be appointed shall take possession of and be entitled to claim and recover all the said property.”

Language could not well be made stronger than this. When property once becomes fully vested for the benefit of the creditors, that vested right in it cannot be destroyed or affected by the subsequent determination of the question of the debtor's discharge. There is no reason why it should be. He owes these debts. His exempt property has already been set aside by the court. He is in no worse position than he was before the proceedings commenced; for this identical property would then have been liable to an execution of his creditors. The first thing he must do under this law is to make the assignment for the benefit of his creditors. When that is done the property is fully

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Concurring Opinion — STILES, J.

[2 Wash.]

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vested in them. The question of "discharge" is for subsequent consideration. If the debtor fails to receive it, it is presumed to be on account of his fraudulent acts, and cannot affect the property which he has seen fit to surrender. Any other construction of the law would result in placing a premium on fraud, and would work a hardship on creditors who, by reason of such surrender, had been put to the trouble and expense of appearing in the proceedings. With this view of the proposition discussed, it is not necessary to discuss the other propositions argued by counsel. The judgment of the court below is affirmed, with costs to appellees.

ANDERS, C. J., and HOYT and SCOTT, JJ., concur.

STILES, J. (*concurring*).—I concur in the decision, and desire to say further that the bill in this case clearly set forth that the property sought to be affected by it was purchased by the partners with money fraudulently diverted by them from the partnership funds. If that is the fact, it is still, in equity, partnership property, although the legal title may have been taken in the name of the partners' wives; and, although it was not included in the partnership schedules, the assignee can sue for and recover it for the benefit of all creditors. If the assignee, upon being put in possession of the facts, neglects or refuses to proceed, he can be compelled to proceed by the court upon the motion of any creditor. The question of discharge cannot affect the case in any way. It is very difficult to see how there can be a discharge in a case of partnership insolvency where the partners do not schedule their individual property and liabilities.

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Opinion of the Court—SCOTT, J.

[No. 67. Decided March 5, 1891.]

## RICHARD ANDERSON v. THE STATE OF WASHINGTON.

CRIMINAL LAW—SEPARATION OF JURY—MOTION FOR NEW  
TRIAL—RECORD ON APPEAL.

Under Laws 1885-6, p. 70, § 1, subd. 7, affidavits in support of a motion for a new trial are part of the record, and will be considered on appeal without any statement of facts or bill of exceptions being settled.

The separation of the jury in capital cases, after the case is finally submitted to them and before rendering their verdict, is error, though the verdict may have been signed and sealed before separation, and defendant's counsel may have consented thereto; the provisions of § 1089, Code 1881, only authorize the separation of juries during the progress of the trial.

*Appeal from Superior Court, Kittitas County.*

The facts are fully stated in the opinion.

*Pruyn & Ready*, for appellant.

*W. C. Jones*, Attorney-General, for The State.

The separating of the jury after finding a sealed verdict was not such misconduct as entitles the defendant to a new trial. *People v. Kelly*, 46 Cal. 357; *Commonwealth v. Carrington*, 116 Mass. 37; *State v. Mix*, 15 Mo. 153; *Quinn v. State*, 14 Ind. 589; *State v. McMahon*, 17 Nev. 369; *Anon.* 63 Me. 590.

The opinion of the court was delivered by

SCOTT, J.—Defendant was convicted of murder in the first degree and is under sentence of death. Only one question is presented by the record. The case was given to the jury in the afternoon of March 25, 1890. It appears by affidavits in support of a motion for a new trial that the jury agreed upon their verdict some time during the night, and the same was signed, sealed up, and de-

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livered to their foreman, and thereupon the jurors left the jury-room, separated, and went around the town for several hours, and did not re-assemble until court convened on the morning of the 26th, when the verdict was returned. The defendant's attorney consented that a sealed verdict might be rendered.

The state contends that the affidavits in support of the motion for a new trial are no part of the record, and, as no statement of facts or bill of exceptions was settled, that the question is not raised, and, if otherwise, that the point was waived by the consent to a sealed verdict, and that it was not error. Section 1, subd. 7 of the act commencing at page 7, Sess. Laws 1885-86, makes such affidavits a part of the record, and this act had not been repealed when this appeal was taken.

No precedent has been shown us, nor do we know of any, for allowing a sealed verdict in a capital case. We have no statute authorizing sealed verdicts, and such a separation of the jury was not authorized, at least according to the better authorities, at common law. See *Thomp. Trials*, §§ 2551, 2552, and authorities there cited. It was conceded that, while the rule that the separation of the jury in a criminal case prior to the receipt of its verdict by the court was a misconduct which would entitle the defendant to a new trial was a good one when made, and could not be disregarded at that time without great danger of seriously prejudicing the substantial rights of the defendant, as then the jury could not render a written verdict in a criminal case, but must render it *ore tenus*, and that, under such a provision of law, if a jury were permitted to separate prior to the rendering of the verdict, they might be subjected to influences dangerous to society and subversive of the rights of the defendant; yet it was argued with considerable force that the reasons therefor no longer apply, as our statute requires written verdicts, and that, when the verdict is once

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Syllabus.

written and agreed upon by the jury, and placed in the hands of the foreman or other proper officer, there then remains no reason why the jury should be kept together. But on the whole we think such a separation of the jury, especially in a capital case, is a dangerous practice, and one we would not care to sanction, even though we felt at liberty to lay down a different rule from that heretofore recognized. There is no necessity therefor, nor any very good reason why such a practice should be adopted, at least in cases of the very gravest importance; and we think this was a matter that defendant could not waive. Code, § 1089, only authorizes the separation of the jury during the progress of the trial before the cause is finally submitted to them. It is not expressly so limited by its language, but the fact that there is no law authorizing a sealed verdict in capital cases requires it to be so interpreted. Reversed and remanded for a new trial.

ANDERS, C. J., and DUNBAR, STILES, and HOYT, JJ., concur.

[No. 136. Decided March 5, 1891.]

JAMES F. REYNOLDS, ROBERT W. BATTERSBY AND PETER S. BATTERSBY, *Copartners*, v. DEXTER HORTON & Co., *Bankers*.

REPLEVIN — TITLE AS AGAINST TRESPASSER — FINDINGS BY COURT — WHEN SET ASIDE.

A finding by the court stands as a special verdict, under Code 1881, § 247, and, unless so clearly unfounded that it would be set aside if made by a jury, will not be disturbed.

Where the lessee of school lands quarries stone thereon, and subsequently assigns the lease and sells the stone to another party, the latter's possession under a claim of ownership made in good faith is sufficient to support an action of replevin against one who, without any right, enters upon the leased land and takes away the stone.

Although the act of quarrying may be waste by the tenant, the possession of his grantee is good as against any mere wrong-doer.

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Statement of the Case.

[2 Wash.]

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*Appeal from Superior Court, King County.*

Action of claim and delivery of personal property by Dexter Horton & Co., Bankers, a corporation, against Reynolds and Battersby Bros., a copartnership. Trial by the court, which made, among others, the following findings of fact, to wit:

“*Third:* That on the 10th day of May, 1890, and for a long time prior thereto, plaintiff was in the possession of the following described personal property, to wit: One thousand tons of rubble and dimension sandstone, then lying and being at what is commonly known as the Le Grande stone quarry, in Whatcom county, State of Washington; that said plaintiff held said stone under and by virtue of a bill of sale of the same, executed to plaintiff by the Builders’ Material Company, a corporation, which said last named corporation quarried said stone upon said lots one, two, three and four of the northwest quarter of the northwest quarter, section thirty-six (36), township thirty-seven (37) north, range two east, in Whatcom county, State of Washington; that said Builders’ Material Company was in possession of said lots at the time of the quarrying of said stone, under and by virtue of the terms of a lease granted by the board of county commissioners of Whatcom county, State of Washington; that said section thirty-six (36) is school lands of the State of Washington; that said lease to the Builders’ Material Company was assigned to the plaintiff, Dexter Horton & Co., Bankers; that under said assignment of lease, the plaintiff, Dexter Horton & Co., went into possession of said lands and stone quarry on the 17th day of February, 1890, and ever since has been and now is in the possession of said land.

“*Fourth:* At the time of the execution of the bill of sale of said stone to Dexter Horton & Co., plaintiffs, and at the time of the assignment of said lease, said plaintiff hired and employed one ——— Scott, who resided at said stone quarry, to look after said stone, and said Scott, as agent of the plaintiff, was in the possession of said stone at the time defendants removed the same.



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Argument of Counsel.

"*Fifth*: That on the 10th day of May, 1890, said defendants, Reynolds & Battersby Bros., at said Le Grande stone quarry, without plaintiffs' consent, came into and took possession of said personal property and placed the same upon a scow, and removed said stone thereon to the city of Seattle, King county, State of Washington."

Judgment for plaintiff, and defendants appeal.

*Geo. D. Blake, and W. Lair Hill, for appellants.*

This case involves the law of landlord and tenant. The State, that is the late Territory of Washington, being the landlord, the "Builders' Material Co." the tenant, and the plaintiff the assignee of the tenant. The quarrying of the stone for the purpose of sale by the tenant was waste. Gear on Landlord and Tenant, § 119; Laws of Washington 1889-90, p. 553, § 7; Cruise's Digest, pp. 62-67, 258; Addison on Torts (Wood's ed.), §§ 325, 350, 351, and note to § 325.

The moment the stone was quarried, whether by the tenant or a stranger, the absolute and exclusive property in and possession to it vested in the landlord. The tenant had no property whatever in it, and it follows as an irresistible conclusion that the landlord, and he alone, could maintain an action to recover it from the defendants. Gear on Landlord and Tenant, §§ 121, 168 and 169; Taylor's Landlord and Tenant (8th ed.), § 771; 1 Addison on Torts (Wood's ed.), pp. 371, 426, 427, 472, 473; 1 Washburn on Real Property (5th ed.), star p. 119; 2 Washburn on Real Property (5th ed.), star p. 393; *Randall v. Cleaveland*, 6 Conn. 328; *Bulkley v. Dolbeare*, 7 Conn. 232; *Van Deusen v. Young*, 29 N. Y. 1; *Tobias v. Cohn*, 36 N. Y. 363; *Cooper v. Randall*, 59 Ill. 317; *City of Chicago v. McDonough*, 112 Ill. 85; *Harlan v. Harlan*, 15 Pa. St. 507 (53 Am. Dec. 612); *McIntire v. Westmoreland Coal Co.*, 118 Pa. St. 108 (11 Atl. Rep. 808); *Gilbert v. Kennedy*, 22 Mich. 5; *Starr v. Jackson*, 11 Mass. 519; *Hastings v. Livermore*, 7 Gray, 194.

It is well settled law that when the plaintiff in a replevin suit, or claim and delivery action under the code, to sustain his claim to the property, relies on his prior actual possession of it, such possession must have been lawful and rightful. Wells on Replevin, §§ 109-111, 678; *Hatch v. Fowler*, 28 Mich. 205; *Bayless v. Lefaiivre*, 37 Mo. 120; *Moorman v. Quick*, 20 Ind. 68; *Miller v. Jones*, 26 Ala. 260; *Weld v. Hadley*, 1 N. H. 298; *Harris v. Smith*, 3 Serg. & R. 23; *Brownell v. Manchester*, 1 Pick. 232; *Stanley v. Gaylord*, 1 Cush. 536.

“A plaintiff in replevin, like plaintiffs in other actions, must maintain his case upon the strength of his own title or claim. It is immaterial whether the defendant has or has not any title when the plaintiff fails to show any in himself. When the plaintiff so fails, the possession of the replevied property as a general rule ought to be restored to the defendant, who if he is not the true owner will be answerable for it to such owner.” Per Metcalf, J., in *Johnson v. Neale*, 6 Allen, 227; *Barry v. O'Brien*, 103 Mass. 520; *Park v. Mellor*, 1 Ld. Raymond, 217; *Simcoke v. Frederick*, 1 Ind. 54; *Marienthal v. Shafer*, 6 Iowa, 223; *Ingraham v. Hammond*, 1 Hill, 353; *Murphy v. S. C. & P. Ry.*, 55 Iowa, 473; *Gartside v. Nixon*, 43 Mo. 138; *Gray v. Parker*, 38 Mo. 160; *Harrison v. McIntosh*, 1 Johns. 380; *Hatch v. Fowler*, 28 Mich. 206; *Patterson v. Fowler*, 23 Ark. 459; *Davidson v. Waldron*, 31 Ill. 120; *Daws v. Greene*, 32 Barb. 490; *Hallett v. Fowler*, 8 Allen, 93.

It is well settled law, that under a general denial of property and right of possession in the plaintiff in a replevin suit, the defendant can show title in a third person and, upon doing so, will always be entitled to a return of the property, where it has been delivered to the plaintiff in the action, without in any way connecting himself with the title of such third person. Law of Replevin (Cobbey),

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Argument of Counsel.

§§ 751, 784-7, 1139; Wells on Replevin, §§ 492, 493, 692-4; *Chamberlin v. Winn*, 20 Pac. Rep. 780, and cases cited; *Prosser v. Woodward*, 21 Wend. 205; *Ingraham v. Hammond*, 1 Hill, 353; *Marienthal v. Shafer*, 6 Iowa, 223; *Louis v. Buck*, 7 Minn. 104; *Quincy v. Hall*, 1 Pick. 357; *Johnson v. Neale*, 6 Allen, 227; *Barry v. O'Brien*, 103 Mass. 520; *Leonard v. Whitney*, 109 Mass. 268; *Belden v. Laing*, 8 Mich. 500; *Ribble v. Lawrence*, 51 Mich. 569.

*Cole, Blaine & De Vries*, for appellee.

The appellee being in possession of the land, it was entitled to the possession of the stone; and no one, not even the landlord, could enter the premises for the purpose of removing stone therefrom. *Johnson v. Elwood*, 53 N. Y. 433; *Hungerford v. Redford*, 29 Wis. 348; *Stockwell v. Phelps*, 34 N. Y. 363; *Halleck v. Mixer*, 16 Cal. 574; *Anderson v. Hapler*, 34 Ill. 438; *Page v. Fowler*, 28 Cal. 607; *Cobbey*, Replevin, § 375.

The naked possession of goods with claim of right is sufficient evidence of title against any one who shows no better title. The appellee in this action having possession of the stone in controversy and claiming to be the owner thereof, was entitled to judgment as against the appellants who never had possession and were never connected with the title. Law of Replevin (*Cobbey*), § 60, and cases cited; 2 Greenleaf on Evidence, § 637; *Duncan v. Spear*, 11 Wend. 54-57, and note; *Demick v. Chapman*, 11 Johns. 132; *Johnson v. Carnley*, 10 N. Y. 570; *Miller v. Adsit*, 16 Wend. 357, and cases cited; *Morris v. Danielson*, 3 Hill, 168; *Van Namee v. Bradley*, 69 Ill. 299; *Van Baalen v. Dean*, 27 Mich. 104; *Hatch v. Fowler*, 28 Mich. 208; *Page v. Fowler*, 37 Cal. 100; *Eisendrath v. Knauer*, 64 Ill. 402; *Davis v. Loftin*, 6 Tex. 497.

The appellants not having connected themselves with the

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[2 Wash.]

title to the stone in this case, all that was necessary for the appellee to show was the fact of its prior possession. Law of Replevin (Cobbey), §§ 90, 136; *Stowell v. Otis*, 71 N. Y. 38; *Cobb v. Megrath*, 36 Ga. 625; *Clark v. Heck*, 17 Ind. 281; *Wortham v. Gurley*, 75 Ala. 356; *Huddleston v. Huey*, 73 Ala. 215; *Jones v. Anderson*, 76 Ala. 427.

A defendant will not be entitled to a judgment of return by simply showing property in a stranger; he must connect himself with the title of the stranger and thus establish a right paramount to that of the plaintiff, justifying the taking of the property. *Stowell v. Otis*, 71 N. Y. 36; *Rogers v. Arnold*, 12 Wend. 30; *Gerber v. Monie*, 56 Barb. 661; *Griffin v. Long Island Railroad Co.*, 101 N. Y. 352; *Johnson v. Carnley*, 10 N. Y. 578 (61 Am. Dec. 762); *Wheeler et al. v. Lawson et al.*, 103 N. Y. 40; *Duncan v. Spear*, 11 Wend. 53; *Delaney v. Canning*, 52 Wis. 266; *Van Baalen v. Dean*, 27 Mich. 104.

The appellants showing no interest in themselves, could not question appellee's interest. 2 Greenleaf on Evidence, § 637; *Eisendrath v. Knauer*, 64 Ill. 402; *Wilson v. Royston*, 2 Ark. 315; *Wallace v. Brown*, 17 Ark. 450; *L. S. & M. S. Ry. v. Ellsey*, 85 Pa. St. 283; *Raynor v. Timerson*, 46 Barb. 526; Law of Replevin (Cobbey), § 88.

The opinion of the court was delivered by

STILES, J.—The court below found as a fact that appellees were in possession of the stone in controversy at the time when appellants entered upon the lands where it lay and removed it. Considering the character of the property—newly quarried stone—we cannot say that the court was not warranted in its finding. Unless the finding was so clearly unfounded as that it should have been set aside had it been made by a jury, we should not disturb it. It stands as a special verdict, and must be so treated. Code, § 247. Being in possession, then, it further appeared that appellees claimed to hold the stone under the

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following circumstances: A corporation known as the "Builders' Material Company" in 1889 obtained from the board of commissioners of Whatcom county a lease of certain lands in section 36, and thereafter, having discovered a ledge of building stone thereon, opened a quarry and took therefrom the stone in question; and while the stone was still lying at the quarry the Builders' Material Company assigned its lease and made a bill of sale of the stone to the appellees. The appellants, without any right in them, entered upon the leased land and took away the stone by collusion with the appellees' agent, who resided upon the land near the quarry, and had charge of the property. The complaint alleged appellees to be the owners and entitled to the possession of the property, and that appellants had wrongfully taken it from their possession. The answer was a general denial. Judgment was for the appellees.

Appellants contend that, inasmuch as the stone was quarried from lands belonging to the state, and that the act of quarrying was waste by the tenant, the possession of the lessee and of its grantee under the bill of sale was wrongful, and not sufficient to base thereon an action for the taking and detention. But, inasmuch as the appellees were in possession of the stone under a claim of ownership made in good faith, although perhaps erroneous, we hold that the orderly administration of affairs in the community requires that the defendants should not be allowed to get and retain the property in the manner shown by the record. The appellees' possession was rightful as against every one, with the exception, possibly, of the state, and was good as against any mere wrong-doer. Wells, Rep., § 110; Cobbey, Rep., § 136; *Sprague v. Clark*, 41 Vt. 6. The judgment of the court below is therefore affirmed, with costs.

ANDERS, C. J., and DUNBAR, J., concur.

HOYT, J. disqualified.

SCOTT, J., expressed no opinion.

[No. 141. Decided March 5, 1891.]

## TURNER &amp; JAY V. IOWA NATIONAL BANK.

## INSOLVENCY — PREFERENCE OF CREDITORS.

Under the laws of this state, a debtor in failing circumstances may mortgage his entire property to secure *bona fide* debts to a portion of his creditors, and leave the debts due other creditors unsatisfied.

*Appeal from Superior Court, Kittitas County.*

Action to foreclose a chattel mortgage given by Lloyd & Co. to the Iowa National Bank to secure an alleged *bona fide* debt of \$17,500. Turner & Jay, who were judgment creditors of Lloyd & Co., intervened, claiming the mortgage to be void as to them, under the insolvency laws of Washington Territory. Plaintiff's demurrer to the petition in intervention was sustained, and the intervenors refusing to plead further, judgment was given against them, from which ruling of the court, and the judgment thereon, intervenors appeal.

*L. A. Vincent*, for appellants.

The mortgage sought to be foreclosed, with other mortgages executed about the same time by Lloyd & Co. to other creditors, constituted an assignment for the benefit of creditors, and was void as such assignment because not made for the benefit of all their creditors. *White v. Colzhausen*, 129 U. S. 329; *Preston v. Spaulding*, 120 Ill. 208; *Kellog v. Richardson*, 19 Fed. Rep. 70; *Clapp v. Dittman*, 21 Fed. Rep. 15; *Perry v. Corby*, 21 Fed. Rep. 737; *Kerbs v. Ewing*, 22 Fed. Rep. 693; *Clapp v. Nordmeyer*, 25 Fed. Rep. 71; *Winner v. Hoyt*, 66 Wis. 227 (57 Am. Rep. 257); *Kendall v. Bishop*, 76 Mich. 634 (43 N. W. Rep. 645); *Straw v. Jenks*, 6 Dak. 414 (43 N. W. Rep. 941); *Chever v. Hays*, 3 Cal. 471; *Cohen v. Barrett*, 5 Cal. 196; *Groschen v. Page*, 6 Cal. 139; *Adams v. Woods*, 8 Cal. 153 (68 Am. Dec. 313); *Dana v. Stanford*, 10 Cal. 269.

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*Pruyn & Ready*, for appellee.

A conveyance made by an insolvent debtor to a creditor to pay or secure an existing honest debt is not fraudulent, although the parties knew at the time that the effect of it would be to defeat the collection of other debts. *Dana v. Stanford*, 10 Cal. 269; *Gladwin v. Gladwin*, 13 Cal. 332; *Wheaton v. Neville*, 19 Cal. 46; *Walden v. Murdock*, 23 Cal. 551; *Lawrence v. Neff*, 41 Cal. 568; *Worland v. Kimberlin*, 6 B. Mon. 608; *Kennard v. Adams*, 11 B. Mon. 102; *Ingraham v. Grigg*, 13 Smedes & M. 22; *Bates v. Coe*, 10 Conn. 280; *Cooper v. First National Bank*, 40 Kan. 5 (18 Pac. Rep. 937). Preferences by failing debtors to particular creditors are not fraudulent. *Cribb v. Hibbard*, 77 Wis. 199 (46 N. W. Rep. 168); 4 Sand. 252; 15 Mo. 378.

The opinion of the court was delivered by

SCOTT, J.—Lloyd & Co. were engaged in the merchantile business, and, being considerably indebted to various parties, they executed mortgages to certain of their creditors to secure the amounts they were owing them respectively. The Iowa National Bank, having been so secured, began an action to foreclose the mortgage. Appellants Turner & Jay, being judgment creditors, and not secured, sought to intervene in said suit. Their petition in intervention alleges that Lloyd & Co. were indebted largely in excess of their ability to pay; that the mortgages aforesaid covered all of their property, and were all executed on the same day; and that the execution of such mortgages, under the circumstances, was in effect an assignment of their property for the benefit of the parties to whom the mortgages were made, and that it was fraudulent as to appellants. Appellants asked that the mortgage be adjudged void as to them, and the property held subject to execution for the satisfaction of their judgment. An execution had been

issued thereon, and returned *nulla bona* prior to said intervention. The plaintiffs demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer. There is no law in this state to prevent a debtor, even though he be in failing circumstances, from paying or securing a portion of his creditors, so long as he does so in good faith, although he should dispose of his entire property in that way, and leave other debts unsatisfied. It is not disputed that this mortgage, and also the others, were given for the purpose of securing *bona fide* debts. There is no reason in justice or equity why this particular mortgage should be held void, and the mortgagee deprived of its security, in order that the property may be made available to satisfy the claim of these intervening creditors. The judgment is affirmed.

ANDERS, C. J., and DUNBAR, HOYT, and STILES, JJ.,  
concur.

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[No. 148. Decided March 5, 1891.]

GEORGE DELFEL v. MARTHA HANSON, JOSEPH A. HANSON, ROYAL J. N. HANSON AND EDWARD P. HANSON.

INTOXICATING LIQUORS—ACTION FOR INJURIES—PARTIES—  
DAMAGES.

Where a widow and minor children sue jointly for the death of the husband and father, under § 2059, Code 1881, giving a right of action for injuries resulting from the intoxication of any person, there is a misjoinder of parties plaintiff, as the words "severally or jointly" in said section refer to defendants and not to plaintiffs.

Where a complaint, in an action for damages for injuries caused by the use of intoxicating liquors, bases the claim for damages on the injury to plaintiffs' means of support, it is error for the court to instruct the jury that plaintiffs would be entitled to damages for injuries to their property, person or means of support.



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Opinion of the Court—HOYT, J.

*Appeal from Superior Court, King County.*

Action by appellees as widow and children of J. N. Hanson, deceased, to recover damages for his death, under § 2059 of the code. There was no allegation in the complaint that plaintiffs sustained any damages, except to their means of support. The court instructed the jury that under the evidence the plaintiffs would be entitled to any damages that they may have sustained by reason of the intoxication of deceased to their property, person or means of support.

*Richard Osborn, Thompson, Edsen & Humphries, and Lewis & Gilman, for appellant.*

There is a misjoinder of causes of action and of parties plaintiff. *Rantz v. Barnes*, 40 Ohio St. 45; *Davis v. Justice*, 31 Ohio St. 369 (27 Am. Rep. 514); *Emory v. Addis*, 71 Ill. 277; *Fountain v. Draper*, 49 Ind. 449; *Barnaby v. Wood*, 50 Ind. 407; *English v. Beard*, 51 Ind. 489; *Hackett v. Smelsley*, 77 Ill. 117; *Baker v. McCoy*, 58 Ind. 220; *Durein v. Pontious*, 34 Kan. 350 (8 Pac. Rep. 428).

The instruction of the court that plaintiffs were entitled to damages for injuries to their property, persons or means of support was too broad and misleading. *Jackson v. Noble*, 54 Iowa, 641; *Kearney v. Fitzgerald*, 43 Iowa, 580.

*N. Soderberg, and T. C. McDivitt, for appellees.*

We cite the court to the following authorities, where the widow joined with her children in an action against a saloon keeper, under statutes not nearly so broad as ours: *Roose v. Perkins*, 9 Neb. 304 (31 Am. Rep. 410); *Kerkow v. Bauer*, 15 Neb. 150 (18 N. W. Rep. 27); *Jones v. Bates*, 26 Neb. 693 (42 N. W. Rep. 751).

The opinion of the court was delivered by

HOYT, J.—The widow and three minor children joined in an action under § 2059 of the code to recover for the

death of the husband and father, brought about by his intoxication caused in part by liquor sold him by the defendant. The record presents many important questions, but the argument here has been almost exclusively confined to two of them, and, as the others are doubtful and unimportant, we shall only decide those argued. The first claim of appellant is, that there was a misjoinder of parties plaintiff. That the four plaintiffs who, under our statute, each have a separate cause of action, could not join in an action, unless by statute authorized so to do, is elementary. It is contended, however, that the section under which the action was brought specially authorized them to sue jointly or severally. The section is as follows:

“Every husband, wife, child, parent, guardian, employé, or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person; and any person or persons owning, renting, leasing, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors, shall, if any such liquors sold or given therein have caused, in whole or in part, the intoxication of any person, be liable, severally or jointly, with the persons selling or giving the intoxicating liquors as aforesaid, for all damages sustained, and the same may be recovered in a civil action, in any court of competent jurisdiction. A married woman may bring such action in her own name, and all damages recovered by her shall inure to her separate use; and all damages recovered by a minor under this chapter shall be paid either to such minor, or to such person in trust for him, and on such terms as the court may direct. In case of the death of either party, the action and right of action to or against his executor or administrator shall survive.”

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It is contended, on the one hand, that the words "jointly and severally" refer to the plaintiffs; and on the other, that they refer to the defendants. We think the latter construction the true one. The other construction would lead to such absurd results that it could not be presumed to have been intended by the legislature. Under the section thus construed, it would be competent for any number of persons, however differently injured, to join in one action; and we might have a case where one person was seeking to recover for the killing of a horse, and another for the loss of an arm. That causes of action thus distinct and several could not properly be joined in an action is too manifest for argument; and even if the statute had provided, in express terms, for such joinder, there could be no real unity of interests between the plaintiffs, for the reason that, though the remote cause of the loss to each would be the same, the immediate cause might be entirely and widely separated acts of the intoxicated person. Besides, the elements that entered into the question of damages would have nothing in common. We think the legislature has not used language that compels us to adopt such an absurd construction. On the contrary, the language can be given its full force, and the words "jointly or severally" held to apply to the defendants, which not only avoids any absurdity, but tends greatly to increase the benefits of said section, by allowing the injured party in one suit to sue any or all who have contributed to the intoxication of the person through whom the injury was received.

The appellant also contended that the evidence showed that the death of the husband and father was not caused by his intoxication, and that for that reason the verdict is wrong. But as this question is one of fact for the jury, under proper instructions, and as the facts may be different upon a retrial of the cause, it would be profitless to discuss

it now. The effect of the instructions have not been largely commented upon, and we shall not review them more than to say that there was nothing in the case to authorize any recovery other than for loss of support, and the instructions should have confined the jury to that element of damages. The judgment must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

ANDERS, C. J., and DUNBAR and STILES, JJ., concur.

SCOTT, J., not sitting.

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[No. 103. Decided March 7, 1891.]

ALEXANDER REED AND LOUISE D. REED v. THE TACOMA  
BUILDING AND SAVINGS ASSOCIATION.

BOUNDARIES—DESCRIPTION IN DEED—PRESUMPTION—EVIDENCE.

Where a deed describes the land conveyed as commencing at a point west of the northeast corner of a certain section, the presumption is that the point is due west, although the north line of the section is not on the true meridian; but such presumption may be rebutted by extraneous testimony.

*Appeal from Superior Court, Pierce County.*

Ejectment by the Tacoma Building & Savings Association against Alexander Reed and Louise D. Reed, his wife. Judgment for plaintiff, and defendants appeal.

*Doolittle, Pritchard & Stevens, and R. B. Lehman, for appellants.*

That the word "west" means "west" or "due west" seems too plain to admit of discussion. It has been decided by the courts that the term "northerly," when not controlled by monuments in the description, signified "due

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north." Devlin on Deeds, § 1035; *Bosworth v. Danzien*, 25 Cal. 297; *Brandt v. Ogden*, 1 Johns. 156; 3 Wash. Real Prop. (5th ed.), 433. And that "easterly," used alone, means "due east." *Pratt v. Woodward*, 32 Cal. 219. "In deeds and levies, courses and distances can be controlled only by monuments." *Chadbourne v. Mason*, 48 Me. 389. See, also, *Jackson v. Reeves*, 3 Caines, 300; *Kenney v. Udall*, 5 Johns. Ch. 474; *Drew v. Swift*, 46 N. Y. 209; *Bosworth v. Danzien*, 25 Cal. 297; *Chinoweth v. Haskell*, 3 Pet. 96; *M'Iver's Lessee v. Walker*, 4 Wheat. 444. "To admit parol proof of a marked line nowhere mentioned in the deed, but entirely variant from its calls, would serve to render titles to real estate dependent not upon deeds of conveyance, and the language of the grantor, and courses, distances and monuments, but to the mere memory of witnesses." *Bruckner's Lessee v. Lawrence*, 1 Doug. (Mich.) 19, 28.

*Garretson, Bracket & Rosling* (*Galusha Parsons*, of counsel), for appellee.

"Monuments are of higher import than courses and distances, and must control the latter, even if it cause a wide departure from them." 3 Wash. Real Prop. (5th ed.), 427, 434; *Coburn v. Coxeter*, 51 N. H. 158; *Piercy v. Crandall*, 34 Cal. 340; *Morse v. Rogers*, 118 Mass. 572; *Davis v. Rainsford*, 17 Mass. 210; *Brown v. Huger*, 21 How. 305; *Morrow v. Whitney*, 95 U. S. 555. The courses "south," "east," "north" and "west" in a deed will be controlled by other descriptions contained in the deed, and may be read "southerly," "easterly," "northerly" and "westerly," in order to make them harmonize and conform to existing landmarks and surveyed lines in the vicinity. *Faris v. Phelan*, 39 Cal. 612; *County of St. Clair v. Lovingson*. 23 Wall. 46; *Irwin v. Tonne*, 42 Cal. 326.

The opinion of the court was delivered by

DUNBAR, J.—The description of the lands in the deed to plaintiff's grantor of that tract of land which is claimed to have been platted into Cavender's first addition is in the words and figures following, to wit:

"Situate, lying and being in the county of Pierce, Territory of Washington, and bounded and described as follows, to wit: Commencing at a point 60 rods west of the northeast corner of section 8, in township 20 north, of range 3 east; running thence west 20 rods, south 8 rods; thence east 20 rods; thence north 8 rods, containing one acre."

The plaintiff proved a straight title to the premises in question from the United States patent, down to and including the deed received by him from his grantor; but, owing to the fact that the north line of said section 8 did not run due west, as indicated by the true meridian, or, in other words, did not run parallel with the meridian line, but diverged from the true west line to the north, the main questions are as to the actual location on the face of the earth, of the north line of the northeast quarter of section 8 as the same runs west from the northeast corner of said section, and whether the deed should be construed to mean west according to the true meridian, or west according to the government survey. On this question the court instructed the jury as follows: "Plaintiff also introduces in evidence a duly certified copy of the several deeds and plats under which it claims title to said lots of land. I instruct you as a matter of law, therefore, that according to the meaning of the language in those deeds, the north line of Cavender's first addition to Tacoma, W. T., in Pierce county, should be laid out on an east and west line starting from the northeast corner of section 8, in township 20 north, of range 3 east, and running thence west according to the United States survey; and that when those deeds upon which the plaintiff relies for its title mentioned, as a be-

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Opinion of the Court—DUNBAR, J.

ginning point, sixty rods west of the northeast corner of said section 8, the construction in law is that such beginning point is on the north line of section 8 according to the United States survey thereof;" which instruction defendant duly excepted to, and assigns as error herein. There were some subsequent instructions that might tend somewhat to modify the rule laid down by the court in the instruction quoted; but that the court substantially instructed the jury that the presumption was conclusive; that west in said deed meant west according to the government survey, and that that was plaintiff's theory of the case, is borne out by the oral argument of the attorneys for the appellee, as well as by the statement in its brief that "unless defendant's counsel can maintain their claim upon the main question of a right to controvert the government's surveys, the rulings and instructions are clearly right. If they can maintain that claim it would be a waste of time to discuss the rulings, as they assume the contrary." We think it is clear that under the description above set forth the government surveys may be contradicted, or, probably more properly stated, ignored. Of the many cases cited by counsel we have been unable to find any that will elucidate or throw any light on the very practical question involved in this case.

We do not think that the mere reference to the northeast corner of section 8, as it is referred to in the deed, is sufficient to raise the presumption that the parties intended to be governed by the United States surveys, but that it was referred to simply as a known point, the same as any monument or specific permanent object might be referred to. If the language of the deed had been, "60 rods west of the northeast corner of section 8 on said section line," then the word "west" would have been construed in connection with the section line, and the presumption would have been

that the conveyance was made with reference to the established government survey; but the language is quite different. If the words of a deed are ambiguous, or susceptible of two constructions, testimony will be allowed to prove the meaning of the deed, although this manner of ascertaining the intention of the parties must not be invoked when the description can be ascertained from the deed itself. Title to land must not rest upon the fallible memory of witnesses when it can be avoided. Appellee in this case argues with a considerable degree of plausibility that there is nothing doubtful in the language of this deed; that the word "west" means "west"; that it is in no sense ambiguous and will not admit of any construction to explain its meaning. However, considering the importance of this decision to the public, and recognizing the probability that the city of Tacoma was uniformly platted and located according to one or the other of the theories urged here, and that structures and improvements amounting to many millions of dollars have been made throughout the city which would probably be affected by this decision, its results reaching far beyond the parties to this action, we are of the opinion that public policy demands that the custom of surveyors, in locating town plats in the state of Washington, and especially in the city of Tacoma, may be submitted to the jury to aid them in construing the intention of the parties to the deed. The jury should be instructed that, under the language of the deed in question, the presumption is that the north line of Cavender's first addition commences at a point 60 rods west, according to the true meridian, of the northeast corner of section 8, in township 20 north, of range 3 east, and running thence west, according to the true meridian, etc.; but that such presumption may be rebutted by extraneous testimony. The judgment is reversed, and the case remanded to the court



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below with instructions to proceed in accordance with this opinion, with leave to amend pleadings.

HOYT and SCOTT, JJ., concur.

ANDERS, C. J., concurs in the result.

STILES, J., disqualified.

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[No. 104. Decided March 7, 1891.]

T. M. CLARK AND JULIA C. CLARK V. THE TACOMA  
BUILDING AND SAVINGS ASSOCIATION.

*Appeal from Superior Court, Pierce County.*

*Parker & Williamson*, for appellants.

*Garretson, Brackett & Rosling* (*Galusha Parsons*, of counsel), for appellee.

DUNBAR, J.—This cause was brought here on substantially the same allegation of error, and involves the same questions raised and discussed in the case of *Reed v. Association*, ante, p. 198; and for the reasons assigned in the opinion in that case the judgment in this case will be reversed, and the case remanded for a new trial in accordance therewith, with leave to amend pleadings.

HOYT and SCOTT, JJ., concur.

ANDERS, C. J., concurs in the result.

STILES, J., disqualified.

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[No. 97. Decided March 11, 1891.]

L. T. CASTOR v. W. H. PETERSON AND L. POOL.

NEGOTIABLE INSTRUMENTS — INDORSEMENT — COMMUNITY  
PROPERTY.

The maker of a promissory note payable to the order of a married woman guarantees her capacity to indorse and transfer the same; and the fact that the note is community property will not affect the title of a *bona fide* indorsee for value before maturity, where he has no notice that the note is community property.

*Appeal from Superior Court, Kittitas County.*

Action by L. T. Castor against W. H. Peterson upon a promissory note payable to the order of Mrs. E. E. Pool, and indorsed by her before due to the plaintiff. L. Pool, the husband of Mrs. E. E. Pool, filed a petition of intervention, setting up facts tending to show that the promissory note was community property, and demanded judgment against the defendant Peterson for the amount of said note. Judgment for intervenor, and plaintiff appeals.

*Davidson & McFalls*, and *Reavis & Mires*, for appellant.

A *bona fide* purchaser for value before maturity shall take negotiable promissory notes clear of all equities and can maintain an action thereon. Code 1881, §§ 15, 497. Such holder is not bound to prove his title after he has shown his holding before maturity for value; the burden is on the one who attacks his *bona fides*. *Hotchkiss v. National Banks*, 21 Wall. 359; *Murray v. Lardner*, 2 Wall. 110; *Swift v. Tyson*, 16 Pet. 1-23; *Swift v. Smith*, 12 Otto, 442. When defendant made the note in question, he guaranteed the capacity of the payee, and is estopped from denying the same. Daniel, Neg. Inst., §§ 93, 227, 242; Bigelow, Est., p. 512. The holder of negotiable paper transferred for value before maturity will be protected,

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although fraudulently transferred and the indorser had no title, unless *mala fides* is shown. *Park Bank v. Watson*, 42 N. Y. 493; *New Orleans, etc., Co. v. Templeton*, 96 Am. Dec. 385; *Doll v. Rizotti*, 96 Am. Dec. 399; Story, Prom. Notes, p. 148.

While a married woman's indorsement at common law did not render her liable, it still was sufficient to effect a valid transfer. Randolph, Com. Paper, § 289; *Moreau v. Branson*, 37 Ind. 195. If it was community property, the payee had power to transfer it by indorsement, as a note made payable to a married woman, although the presumption may be that it is community property, cannot be indorsed by the husband. *Kempner v. Comer*, 11 S. W. Rep. 194. A bill or note must be negotiated by the *de facto* holder of it. Lawson, Rights, § 1556; *Nightingale v. Wittington*, 8 Am. Dec. 101.

*Pruyn & Ready*, for appellee Pool.

All property acquired by husband and wife or either of them during coverture is *prima facie* community property; the presumption attending the possession of property by either spouse is that it belongs to the community. *Huston v. Curl*, 8 Tex. 239; *Cooke v. Bremond*, 27 Tex. 457; *Smith v. Smith*, 12 Cal. 217; *Meyer v. Kinzer*, 12 Cal. 248; *Mott v. Smith*, 16 Cal. 557; *Durham v. Chatham*, 73 Am. Dec. 230; *Smith v. Strahan*, 67 Am. Dec. 622, note p. 629; *Higgins v. Johnson's Heirs*, 70 Am. Dec. 394; *Love v. Robertson*, 56 Am. Dec. 41; *Depas v. Mayo*, 49 Am. Dec. 88; *McDonald v. Badger*, 23 Cal. 393; *Lake v. Lake*, 4 Pac. Rep. 723; *Morris v. Hastings*, 8 Am. St. Rep. 571; *Althof v. Conheim*, 38 Cal. 230.

The wife could not dispose of the community personal property. Her indorsement alone on the note conveyed no title. *Tyron v. Sutton*, 13 Cal. 490; *Wells v. Cockrum*, 13 Tex. 127, 128. At common law the holder of a prom-

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[2 Wash.

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issory note payable to a wife and indorsed by her was liable in trover or replevin at the need of the husband, and the maker was liable for the amount of the note to the husband. Daniel, Neg. Inst., § 242; Randolph, Com. Paper, § 288; *Hemmingway v. Mathews*, 10 Tex. 207. The possession of community property by the wife is the possession of the husband. *People v. Swalm*, 80 Cal. 46 (13 Am. St. Rep. 98).

The opinion of the court was delivered by

HOYT, J.—Defendant W. H. Peterson made his negotiable promissory note to Mrs. Eliza E. Pool or order for the sum of \$1,070. This note the payee sold to the plaintiff for a valuable consideration, and indorsed the same, and delivered it to said plaintiff before its maturity. Plaintiff sought in this action to recover upon said note against the maker. L. Pool, the husband, intervened in the suit, and alleged that the money loaned for which the note was given was community property, and claimed that the transfer to plaintiff was void, and that he had no title upon which he could recover of the maker. The court below sustained this contention of the husband, and gave judgment for defendants.

There was no evidence tending to show bad faith on the part of plaintiff, and the only circumstance relied upon to charge him with notice that the note was claimed by the community was the fact that it was payable to a woman whom he supposed to be married. Under these circumstances, we think plaintiff took such a title to the note that he should have been allowed to maintain his action against the defendants. The maker promised to pay Mrs. Eliza E. Pool, or order, and in making the note so payable he guaranteed, to every person taking such note in good faith, her ability to order the same paid to another—that is, to indorse it—and as to every such person buying in good faith and for value such guaranty was conclusive. That

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the maker of negotiable paper thus guarantees the capacity of the payee to indorse and transfer the same seems to arise from the necessity of the case, and the rule is therefore founded upon reason. It is likewise abundantly supported by authority. See Daniel, Neg. Inst., § 93, and cases there cited. This rule has been frequently applied to notes made to and transferred by infants. See § 227 of authority above cited. Likewise to married women under the disabilities of the common law. See same authority, § 242. In the case of a married woman under the disabilities of the common law such a note was the property of her husband, and besides she had absolutely no power to make a contract of any kind, and if, as we have seen, the maker of a note to such person could not dispute the title of her indorsee, it is evident that he could not do so in the case at bar. Under our law the wife is fully competent to make a personal contract, and an indorsee of such married woman stands in a much stronger position than under the common law. Any other rule as to the passing of title to negotiable paper would be contrary to the universal practice of the commercial world in its dealing therewith. An indorsee knows that he is responsible for the genuineness of the indorsement under which he holds, and he understands that in further transferring it he guarantees that the first indorser is the payee, and that the indorsement of each special indorsee is the genuine signature of the person so named; but we think that it would work a great revolution in business circles, and cause an unheard of panic therein, if the doctrine was once established that, in addition to the responsibilities above named, he also assumed that of a guarantor of the title and capacity to sell of all prior indorsers.

We do not lose sight of the fact that all property, personal as well as real, acquired after marriage, is *prima facie* that of the community; but we hold that, from the

very nature of negotiable paper, one who makes it payable to the order of any person cannot be allowed to say to a *bona fide* holder that the authority which he in terms gave to such person to order the same paid to another is void. We think, moreover, that, from the nature of such property, money and negotiable paper bear a different relation to the community than other property. Not that they do not belong to the community, as between the spouses and all others having full knowledge of all the facts, but that, as between the one who is in possession thereof and one dealing in good faith and for value, they should be treated as the separate property of such possessor. We cannot see that public policy would be subserved by holding the presumption as to ownership of such possessor to be less than that of another person who is in the possession thereof without any semblance of title except such possession. Yet the books are full of cases where the title to purchasers in good faith of such property has been sustained although it appeared that the one from whom title was received had none except possession. The possession of these classes of property raises a much greater presumption of title than the possession of other classes, and we think that the rules of the law-merchant in relation thereto have not been changed by our statute.

The claim of intervenor is so unconscionable that courts would not give it effect unless the statute very clearly warranted his contention. He says that the community had \$1,070; that it loaned it, and obtained the note in question; that it delivered said note to plaintiff, and received therefor \$1,070, and is thus placed in exactly the same position as before the note was taken; but that it is still entitled to recover of the maker of the note another \$1,070, thereby, without any consideration having passed therefor, doubling its money, and this at the expense of the plaintiff, who, though having contributed his \$1,070 to the com-

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munity, is turned out of court without a cent. The judgment must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

ANDERS, C. J., and DUNBAR, SCOTT, and STILES, JJ., concur.

[No. 50. Decided March 12, 1891.]

WILLIAM SQUIRE v. GEORGE H. GREER.

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BOUNDARIES—GOVERNMENT SURVEYS—APPEAL—STATEMENT OF FACTS.

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A statement of facts will be considered by the supreme court, where the record shows that it was agreed upon by the attorneys of both parties to the action, certified by the judge, and by an order of the court substituted for an original statement which had been lost.

A court cannot correct the government surveys and establish government corners at points other than the points located by the government; but its investigation must be directed towards ascertaining the fact where the government corners are actually established, not where they ought to be.

Where a grantor conveys lands, describing them according to government survey, the presumption is that the deed conveys all the land within the subdivisions described, according to the actual survey; but parol evidence is admissible to show the intention to convey a certain definite piece of land, and that the parties were mistaken in the location of the government line.

*Appeal from Superior Court, Pierce County.*

Action by George H. Greer against William Squire to quiet title to certain lands in Pierce county, Washington. Trial by the court, which made certain findings of fact and conclusions of law, on which judgment was rendered for plaintiff. The findings having been lost, both parties agreed upon a copy thereof, which was duly substituted and filed by order of the court. The following are the findings and conclusions of law, to wit:

“*First:* That on the 10th day of October, 1882, the said plaintiff was the owner in possession of the southwest quar-

ter of section thirty (30), township twenty (20) north, range three (3) east of the Willamette meridian, in Pierce county, Washington, and on that day conveyed, by good and sufficient general warranty deed, the above described premises and delivered possession of all of said tract to the above named defendant, William Squire.

*“Second:* That on the 25th day of May, 1883, by patent from the United States, the plaintiff first became the owner of lot number two (2) and the southeast quarter of the northwest quarter of section thirty (30), township twenty (20) north, range three (3) east of the Willamette meridian, being a tract lying immediately north of the tract conveyed to the defendant October 10, 1882.

*“Third:* That the only question involved and the only point in controversy herein, is as to the government location of the northwest corner of the southwest quarter of section thirty (30), township twenty (20) north, range three (3) east of the Willamette meridian. The plaintiff contends that it is forty chains north of the southwest corner of section thirty (30), township twenty (20) north, range three east of the Willamette meridian, and the defendant contends it is fifty-five chains north of the southwest corner of section thirty (30), township twenty (20) north, range three (3) east of the Willamette meridian.

*“Fourth:* The western boundary line of section thirty (30), township twenty (20) north, range three (3) east of the Willamette meridian, or the range line between township twenty north, ranges two and three east of the Willamette meridian, Pierce county, Washington, was originally surveyed, located and the section and quarter section corners were set and established by Phillips & Strickler, deputy-surveyors of the United States, in the year 1855, the survey and location of section and quarter section corners, as then made, were approved by the surveyor-general and accepted by the department of the interior, and the southwest quarter of section thirty (30), township twenty (20) north, range three (3) east of the Willamette meridian, and all other lands in that locality, were patented by the United States according to that survey.

*“Fifth:* That the northwest corner of the southwest quarter of section thirty (30), township twenty (20) north,



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range three (3) east of the Willamette meridian, as originally made and established by Phillips & Strickler, deputy-surveyors of the United States, in the year 1855, and approved by the surveyor-general and accepted by the department of the interior, and according to which the said southwest quarter of section thirty (30), township twenty (20) north, range three (3) east of the Willamette meridian, and all lands in that locality, were patented, is fifty-five chains north of the southwest corner of section thirty (30), township twenty (20) north, range three (3) east of the Willamette meridian, and twenty-five chains south of the northwest corner of the same section; if the bearing trees described below and given in the original field notes should be found to be correct, then the northwest corner of the southwest quarter of section thirty (30) is fifty-five chains north of the southwest corner of said section; otherwise said corner is forty chains north of the said southwest corner of section thirty (30), township twenty (20) north, range three (3) east of the Willamette meridian; that said quarter-section corner when originally established was witnessed by two bearing trees described in the original field notes as follows: 'A white oak 18 ins. dia. S.  $30\frac{1}{2}^{\circ}$  W. 128 links distant.' 'A white oak 18 ins. dia. S.  $73^{\circ}$  W. 140 links distant.' That both of said witness trees are still standing in perfect health and growing condition, and the original cuts, marks and records made on them by the surveyors, Phillips & Strickler, in the year 1855, are still in perfect preservation and plainly and definitely mark and establish the said northwest corner of the southwest quarter of section thirty (30), township twenty north, range three east of Willamette meridian.

"*Sixth:* That if the northwest corner of the southwest quarter of section thirty (30), township twenty (20) north, range three (3) east of the Willamette meridian, is at the point located by Phillips & Strickler in the year 1855, and is witnessed by the bearing trees described in the fifth finding of fact herein, then the land in question belongs to the southwest quarter of section thirty (30), township twenty (20) north, range three (3) east of the Willamette meridian and should go to the defendant; and otherwise should go to the plaintiff."

As conclusions of law, the court finds —

“*First:* That the northwest corner of the southwest quarter of section thirty (30), township twenty (20) north, range three (3) east of the Willamette meridian, should be established at a point forty chains north of the southwest corner of section thirty (30), township twenty (20) north, range three (3) east.

“*Second:* That all adverse claims of the defendant and all persons claiming under him, to or upon that piece or parcel of land described in the United States patent No. 6,596, as follows: Lot number two and the southeast quarter of the northwest quarter of section numbered thirty (30), in township numbered twenty north, of range numbered three east of the Willamette meridian, in Washington Territory, containing seventy-four acres and four hundredths of an acre, according to the official plat of the survey of the said land returned to the general land office by the surveyor-general, which said tract has been purchased by the said George H. Greer, or any part thereof, and that the claims of the defendant be invalid and groundless, and that the plaintiff is adjudged to be the true and lawful owner of the land in controversy, and his title to the same was thereby quieted against all claims of the defendant and his heirs and all others, and they are hereby perpetually restrained from setting up any claim to the same or any part thereof.

“*Third:* That the plaintiff is entitled to judgment quieting his title to the land in question.”

*Town & Likens*, for appellant.

The corners established by the original surveyors of the public lands by authority of the United States, are conclusive as to the boundaries of sections and divisions thereof; and no error in placing them can be corrected by any survey made by individuals or a state surveyor. *Arnier v. Wallace*, 28 Miss. 556; *Campbell v. Clark*, 6 Mo. 219; 8 Mo. 553.

When a deed designates the land conveyed as one of the subdivisions known to the United States survey, as, for

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instance, a quarter, half-quarter, or quarter-quarter section, the presumption is that the parties intend that the tract shall be ascertained in the same manner as is done in government surveys. *Cogan v. Cook*, 22 Minn. 142.

In government surveys the line actually run by the government surveyors is a true line. *Goodman v. Myrick*, 5 Or. 65.

When the boundaries of lands are fixed, known and unquestionable monuments, though neither courses, distances nor computed contents correspond, the monuments must govern. *Pernam v. Wead*, 6 Mass. 131; *Moore v. People*, 2 Doug. (Mich.) 424; *Nelson v. Hall*, 1 McLean, 518; *Bower v. Earl*, 18 Mich. 367.

Marked lines and corners control courses and distances. Surplus lands do not vitiate a survey, nor does a deficiency of acres called for in a survey operate against it. "Wherever the boundaries can be established they must prevail." *Robinson v. Moore*, 4 McLean, 279; *Morrow v. Whitney*, 5 Otto, 551.

The gist of the authorities is, that when monuments like trees, or long established corners are given, and indisputable witness trees remain, which locate the corner, the courses and distances cannot change the location. *Lindsey v. Hawes*, 2 Black, 554; 4 McLean, 279; 2 Story, 278. See, also, *May v. Baskin*, 12 Smedes & M. 428; *Lewen v. Smith*, 7 Port. 428; *McClintock v. Rogers*, 11 Ill. 279; *Martin v. Carlin*, 19 Wis. 454 (88 Am. Dec. 696); *Coal Company v. Clement*, 95 Pa. St. 126; *Morrow v. Whitney*, 95 U. S. 551; *Brown v. Huger*, 21 How. 305; *Lodge v. Barnett*, 46 Pa. St. 477; *Manter v. Picot*, 33 Mo. 490; *Kellogg v. Mullen*, 45 Mo. 571; *Park v. Pratt*, 38 Vt. 545; Rev. St. U. S., § 2396.

*Galusha Parsons*, and *C. P. Culver*, for appellee.

The statement of facts brought here by appellant is not in compliance with and is not authorized by the act of

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November 23, 1883. *Mulkey v. McGrew*, 2 Wash. T. 262; *Breemer v. Burgess*, 2 Wash. T. 290. The case cannot be heard in this court on its merits further than is shown by appellant's record. *Swift v. Stine*, 3 Wash. T. 520. As between private parties, there can be but one answer as to what the courts would do; they would hold the parties to their bargain as they understood it. *Cavazos v. Trevino*, 6 Wall. 773; *Thomp. Trials*, § 1468; *Warvelle, Vendors*, p. 380, § 11.

Corners are shown to be established by all the surrounding facts, and, if in controversy, by distances run, witness trees marked, posts set, mounds made, etc. *Preston's Heirs v. Bowmar*, 6 Wheat. 580; *Morrow v. Whitney*, 95 U. S. 551; *Land Co. v. Saunders*, 103 U. S. 316; *White v. Luning*, 93 U. S. 525; 2 Wheat. 316; *Dygert v. Pletts*, 25 Wend. 402; *Wilson v. Hildreth*, 118 Mass. 578; *Greenl. Ev.*, § 301, and cases cited.

The opinion of the court was delivered by

DUNBAR, J. — We do not think that the point raised in appellee's brief, that the statement of facts was misleading, or not understood by the court, is well taken. The record shows that the statement of facts was agreed upon, and regularly signed, by the attorneys of both parties to the action, and certified to by the judge; and that the statement of facts presented here was by the order of the court substituted for the original statement of facts, which had been lost. Nor do we think that the decisions cited by appellee, to wit, *Mulkey v. McGrew*, 2 Wash. T. 259 (5 Pac. Rep. 842); *Breemer v. Burgess*, 2 Wash. T. 290 (5 Pac. Rep. 733, 840); *Swift v. Stine*, 3 Wash. T. 518 (19 Pac. Rep. 63), are adverse to appellant's right to this appeal. Those cases only go to the extent of refusing to decide questions of fact further than the records disclose the facts. While the record here does not disclose the testimony sufficient for this court to

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determine definitely the rights of the parties, it does disclose enough to show error in the court, in that the conclusions of law were not justified by the statement of facts; and we conclude that the judgment of the court was rendered on the theory that the court could correct the government surveys, and establish government corners at points other than the points located by the government. This seems to have been the theory on which the case was tried. The presumption is, that the grantor intended to convey the lands embraced within the boundaries described according to the government survey; and the investigation of the court must be directed towards ascertaining the fact where the government corners are actually established, and not where they ought to have been established. But this presumption is by no means conclusive; and, while parol evidence will not be admitted to dispute the written contract, it may be admitted to explain it, and to show their understanding. This was a conveyance between private parties; and if the intention was to convey a certain definite piece of land, and especially if the land was actually located, that could be shown, or any circumstance tending to show the intention of the parties. In conveyances by private parties descriptions by legal subdivisions are used for convenience, and it would be a hard and unjust rule to hold parties to a conveyance of property not intended to be conveyed, though mistaken understanding of where a government line was located, especially when it can be shown that the government survey was misleading, and the lines of survey deviated from their proper and intended course; but, as we have before said, the presumption is that the deed conveys all the land within the subdivisions described according to the actual survey. The judgment is reversed, and the case is remanded to the lower court, with instructions to retry the same in accordance with this opinion.

ANDERS, C. J., and HOYT and SCOTT, JJ., concur.

STILES, J., disqualified.

[No. 85. Decided March 12, 1891.]

THE PACIFIC CABLE CONSTRUCTION COMPANY V. N.  
McNATT.

## JUDGMENT—CONTRACT—JOINT LIABILITY—ESTOPPEL.

In an action against two corporations for materials furnished them on request of certain of their officers, a joint judgment cannot be sustained where there is no evidence that the officers had authority to bind defendants jointly, and the only evidence of a joint contract was the failure, at an interview between the parties subsequent to the contract, to deny such a liability, and the taking by defendants of a joint receipt for a payment made on account of said contract. (DUNBAR, J., dissents.)

The failure on the part of defendants to deny liability, and their taking of a joint receipt for the sum paid, will not operate as an estoppel on the ground that they thereby led plaintiff, who was the assignee of the original contractor, to believe that they had jointly contracted, or were jointly liable, when plaintiff before bringing suit sought to hold but one of the defendants liable.

*Appeal from Superior Court, King County.*

The facts are fully stated in the opinion.

*Metcalf, Turner & Burleigh*, for appellant.

*Dyer & Craven*, for appellee.

The opinion of the court was delivered by

SCOTT, J.—This action was brought by the appellee against the appellant and the Seattle Construction Company to recover pay for certain piles and certain cord-wood furnished by one Nickum at the request of one Jackson and one Thompson. Jackson was then superintendent of each of the defendant corporations, and also of another corporation known as the Lake Washington Steam Navigation Company, and Thompson was president of appellant and vice-president of the other defendant, and manager of both companies.

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The plaintiff recovered a verdict and judgment, which appellant claims there was no evidence to sustain as against it. The evidence was not sent up, but in its stead a statement of what the proof tended to show, from which it appears that Jackson was in the habit of making contracts and purchases for each of the three companies named without indicating which one he acted for in any particular transaction, and that he allotted the expense to the proper company when it was presented. Nickum knew of the relations of Jackson to the defendant companies. It is very uncertain what the understanding of the parties at the time was. The first clause of the statement is, that "in the month of September, 1888, one J. W. Nickum made a contract with Andrew Jackson and J. M. Thompson to furnish them certain cord-wood and certain piling." This, literally construed, would indicate that it was furnished to them individually and not in any representative capacity, and would be conclusive as against the plaintiff in this action. Passing over it, however, it appears that Nickum testified he understood he was furnishing the chattels to appellant, but it does not appear that this supposition—for it was apparently nothing more—was based upon any action or conduct of the appellant in relation to the transaction.

Nickum assigned the claim to McNatt, the plaintiff, but the form of assignment is not shown, nor does it appear whether he therein, or otherwise, specified any one as owing the amount, or chargeable therewith. McNatt first sought to charge the Seattle Construction Company, and so made out his claim and placed it in the hands of attorneys for collection, but he was advised by them to sue both companies, and he did so. It seems this course was pursued, or thought to be sanctioned, because, as stated, "that at various interviews between Nickum and plaintiff and the defendants, subsequent to the making of the contract, there were disputes as to the amount due thereon, but no distinct

denial of liability on the part of either of the defendants on the ground that the contract had not been made in their behalf. There was also evidence that at one such interview a payment was made on account of said contract, and a receipt taken in the name of both defendant companies," as there is nothing but this in the entire statement that could be claimed as even colorably tending to show any joint liability. This, considered with the other circumstances, furnishes no proof to sustain a claim against the defendants jointly, for the balance. As to how the defendants were present at these said interviews, or by whom they were represented, the record is silent, unless it was by Jackson and Thompson, the only parties designated as having acted for them. No mention is made of any other officers or of any trustees or other agents. If the defendants were represented there by any person having authority to bind them jointly, the matters spoken of could only operate to bind them in two ways, if at all: First, that the failure to deny such a liability and the taking of a joint receipt was evidence of an original joint contract; but this cannot be claimed; Nickum, under whom the plaintiff claims, did not so understand it, as he testified, and there is no claim made and nothing to show that Jackson and Thompson, or either of them, had any authority to bind the defendants jointly. Consequently, there was no force therein in this direction. The second and only other ground upon which it could have been relevant was in the way of an estoppel. That by the failure to deny, and the taking of a joint receipt for the sum paid, the defendants led the plaintiff to believe that they had jointly contracted or were jointly liable, and that they thereby estopped themselves from denying a joint liability by inducing the plaintiff to act differently than he otherwise would have done in the premises. Now, can it be claimed that it did have any such effect? Evidently not, for McNatt did not understand that they were jointly



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liable, or that they thereby assumed any joint liability, for he thereafter only sought to hold the Seattle Construction Company, so whatever was there done, it could not have operated as an estoppel. The defendants were not called upon to deny a joint liability, or even a separate liability, unless there was an attempt to so charge them, and there is nothing to show that there was any attempt at any of said meetings, or at any time previously, to charge them jointly, or any attempt there to charge the appellant separately for that matter. The mere taking of a joint receipt under the circumstances shown from the plaintiff's own case amounted to nothing in support of the plaintiff's action.

It is fair to assume from the record, however, that the defendants were represented at these meetings by Jackson and Thompson, the only parties mentioned as having acted for them or either of them in the premises, and they could not bind the defendants jointly by any silence or admission or ratification of their own previous acts, if they had no authority to make a joint contract. The only claim is, that Jackson had authority to bind the companies severally for the amount of purchases made by him for each respectively, in consequence of his habit of so buying and his recognized course of dealing. It appears by the statement that the piles furnished were used by the Lake Washington Steam Navigation Company and the cord-wood was used by the Seattle Construction Company; that no part of either was received or used by appellant, and that it derived no benefit from said purchases. It does not even appear that appellant was in any wise severally liable, for under the plaintiff's own showing as to the authority of Jackson the contract was unauthorized if it purported or attempted to charge appellant for property that was in no wise furnished to it, and it does not appear that Thompson had any authority in the premises, and under no theory, upon the

facts shown, could the defendants be held jointly liable for the whole amount. It is not claimed that Jackson did allot the expense of these purchases to either or both of said defendants, and his habit of allotting expenses generally would cut no figure if he did not in fact allot this particular expense. Most likely the first clause of the statement was correct, that the chattels were really furnished upon the personal responsibility of Jackson and Thompson.

Appellant's point that there was no evidence to sustain a recovery as against it, or as against it and the other defendant jointly, was well taken and should have been sustained. Of course, appellant's individual liability, even if it was so liable, would not avail the plaintiff in the present action. Judgment reversed.

ANDERS, C. J., and HOYT and STILES, JJ., concur.

DUNBAR, J. (*dissenting*).—I dissent. In my opinion the judgment in this case cannot be disturbed without usurping the province of the jury. The jury heard the testimony and saw the witnesses face to face; and the statement of facts shows that there was sufficient testimony, if the jury believed it, to warrant the verdict. It may be uncertain what the understanding of the parties to the contract was; but where there is an uncertainty as to any fact concerning which evidence is introduced, that is a question for the jury and not the court. Nickum testified that his understanding was that he was furnishing the material sold to the Pacific Cable Construction Company, and the jury doubtless concluded that the testimony justified his understanding. The testimony shows that at various interviews between Nickum and plaintiff and defendants in relation to the payment of this claim, subsequent to the making of the contract there were disputes as to the amount due thereon; but that neither of the defendants distinctly denied their liability, and that at one such interview a pay-

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ment was made on account of said contract, and a receipt taken in the name of both defendant companies. From this the jury could fairly infer a joint liability.

It is urged that the record is silent as to how the defendants were present at those said interviews, or by whom they were represented. The statement of facts as certified by the judge simply shows that those interviews were between Nickum and plaintiff and defendants. The statement is plain, and must be construed against a defendant corporation the same as against a defendant individual. To give any force to the finding at all, it must be presumed that the defendant was there by its accredited agent, otherwise it was not there at all; and there is no sense to the finding.

Appellants cannot object to the judgment being jointly against them and the Seattle Construction Company, and urge the fact that Nickum's testimony would tend to relieve the Seattle Construction Company of any liability. It is time to review that question when the Seattle Construction Company asks to be relieved from the judgment.

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[No. 127. Decided March 12, 1891.]

P. BANNER *et al.* v. L. J. MAY, D. B. MAY AND B. E. SNIPES.

**FRAUDULENT CONVEYANCES.**

Where a debtor in failing circumstances transfers all her real and personal estate for an inadequate consideration to one creditor who is cognizant of the fact that other creditors are pressing for payment of their claims, and the creditor to whom the property has been transferred allows the debtor and her husband to remain in possession and control of the property, making payment to creditors out of the rents and profits thereof, the conveyances will be set aside as fraudulent and void as against creditors.

*Appeal from Superior Court, Yakima County.*

The facts are fully stated in the opinion.

*D. J. Crowley, and Whitson & Parker, for appellants.*

Fraud is established by circumstances. It can seldom be proved directly. Bump, *Fraud. Conv.* (3d ed.), pp. 600, 601; Wait, *Fraud. Conv.*, §§ 224, 228; *Rea v. Missouri*, 17 Wall. 532; *Purkitt v. Polack*, 17 Cal. 327; *Jackson v. Mather*, 7 Cow. 301. The law has denominated certain circumstances as badges, signs or evidences of fraud. Among the badges which have been held sufficient to invalidate a sale, and which are found in this case, are the following: Conveyance of the whole estate of the debtor. Bump, *Fraud. Conv.* (3d ed.), p. 34; Wait, *Fraud. Conv.*, § 231; *Sayre v. Fredericks*, 16 N. J. Eq. 205. Vendor remaining in possession of property and applying proceeds and profits to his own use. Bump, *Fraud. Conv.* (3d ed.), p. 49; Wait, *Fraud. Conv.*, § 241; *Lukins v. Aird*, 6 Wall. 78; *Callan v. Statham*, 23 How. 477; *Decker v. Wilson*, 45 N. J. Eq. 772 (15 Atl. Rep. 816). A transfer when suits are pending or threatened against grantors. *Stoddard v. Butler*, 20 Wend. 507; *Godfrey v. Germain*, 24 Wis. 410; *Glenn v. Glenn*, 17 Iowa, 498; *Hudgins v. Kemp*, 20 How. 45; *Garland v. Rives*, 4 Rand. 282 (15 Am. Dec. 756). Failure to take inventory and account of stock. *Gollober v. Martin*, 33 Kan. 252 (6 Pac. Rep. 267); *Redhead v. Pratt*, 72 Iowa, 99 (33 N. W. Rep. 382). Fraudulent statement of consideration. Bump, *Fraud. Conv.* (3d ed.), p. 42; Wait, *Fraud. Conv.*, § 228. Inadequacy of consideration is a badge of fraud. *Kempner v. Churchill*, 8 Wall. 362; *Clark v. Depew*, 25 Pa. St. 509 (64 Am. Dec. 717). A sale under unusual circumstances and out of the usual course of business, and where grantee enters into a business foreign to his own, is tainted with suspicion. Bump, *Fraud. Conv.* (3d ed.), pp. 51, 52.

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It is not necessary that the grantee should have actual knowledge of the debtor's intent to delay, hinder or defraud his creditors, in order to render the transfer void. A knowledge of facts sufficient to excite the suspicions of a prudent man and to put him on inquiry, or to lead a person of ordinary perception to infer fraud, or the means of knowing by the use of ordinary diligence, amounts to notice, and is equivalent to actual knowledge in contemplation of law. *Clements v. Moore*, 6 Wall. 312; *Lukins v. Aird*, 6 Wall. 78; *Bartles v. Gibson*, 17 Fed. Rep. 293; *Green v. Tantum*, 19 N. J. Eq. 105, and 21 N. J. Eq. 364; *Mills v. Howeth*, 19 Tex. 257 (70 Am. Dec. 331); *Smith v. Vreeland*, 16 N. J. Eq. 198; *Temple v. Smith*, 13 Neb. 513 (14 N. W. Rep. 527); *Gollober v. Martin*, 33 Kan. 252 (6 Pac. Rep. 267). If the grantee paid full consideration for the property he is not protected by it, if he knew of the fraudulent design of the grantor, or had sufficient to put him upon inquiry.

*Reavis & Mires*, and *W. Lair Hill*, for appellees.

Burden of proof rests on creditors who impeach the conveyances. *Johnson v. McGrew*, 11 Iowa, 151 (77 Am. Dec. 137); *Hempstead v. Johnston*, 18 Ark. 123 (65 Am. Dec. 458, and notes). Fraud cannot be inferred from the fact that sale necessarily gave preference. *York County Bank v. Carter*, 38 Pa. St. 446 (80 Am. Dec. 494). Fraudulent intent must be proved; suspicion is not enough; inadequacy of price is not sufficient. *Jaeger v. Kelley*, 52 N. Y. 274. Snipes, as purchaser, could properly testify as to his intentions. *Starin v. Kelly*, 88 N. Y. 418; *Seymour v. Wilson*, 14 N. Y. 567; *Bedell v. Chase*, 34 N. Y. 386. When the vendee purchases property for the sole purpose of receiving payment of an honest debt, the fact that the vendor sold with intent to hinder and delay his creditors does not make the sale void as to such creditors, and thus, although the vendee had knowledge of such intent, it must be made to

appear that the vendee participated in the fraudulent intent. *Dudley v. Danforth*, 61 N. Y. 626. Although the purchase exceeds the amount of the indebtedness, still, if the excess is reasonably necessary for attaining the lawful purpose of satisfying the actual debt, the purchase to the whole extent may be attributed to the motive of self-interest, and therefore the mere fact of the excess does not of itself invalidate the transaction unless there are other circumstances tending to show fraudulent intent on the part of the purchaser. Bump, *Fraud. Conv.*, p. 194, and authorities cited. The possession of land transferred is not a badge of fraud. Bump. *Fraud. Conv.*, p. 121.

The opinion of the court was delivered by

STILES, J.—The plaintiffs below, who are appellants here, were judgment creditors of the appellee Laura J. May, who for a number of years carried on business as a merchant, with her separate property, at Yakima city. Mrs. May, in addition to her stock of merchandise, owned a number of town lots, and several hundred acres of farming land, and a flour mill. The mill was at Yakima city, and was operated by her. D. B. May was the husband of Mrs. May, but had no interest in the property or business involved in the cause. Prior to March 14, 1881, Mrs. May had carried on her merchantile business, and on that day she bought from the defendant Snipes a stock of goods then at Yakima city, and in payment therefor gave him her note for \$16,213, payable ten months after date, with interest at one per cent. per month. On the day of its date \$530 was credited on the note, leaving its actual principal \$15,683. No further credits appear on the note. On December 11, 1883, Mrs. May executed to the defendant Snipes a bill of sale of her stock of goods, and the appliances and appurtenances connected therewith, and her safe, all book accounts, wheat and flour at the mill, a lot of hogs, hay, horse, wagon

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and harness, and two lots of bacon, stored in Yakima; and at the same time she executed to the same party a deed of all her real estate in and about Yakima, excepting eighty acres of land called the "family homestead." These two conveyances embraced all of Mrs. May's property excepting the homestead and household goods. The consideration expressed in the bill of sale was \$16,150; that in the deed was \$17,225.66. The consideration claimed to have been paid was \$10,505 in money, the principal of the note above alluded to (\$15,683), and interest thereon to date \$5,159.75, the sum of \$5,548.75 due to one Murray, and the sum of \$2,400 due to the First National Bank of Yakima; making a total of \$39,311.14, or \$5,935.48 more than was expressed in the conveyances. The amounts due Murray and the First National Bank were secured by attachments upon more or less of the property, and were assumed by Snipes; and we find that these amounts and the \$10,505 cash were actually paid by him, in all \$18,453.75. Of the amount involved in the note we shall speak later. The conveyances above alluded to were made under the following circumstances: Mrs. May, in addition to Murray, the bank and Snipes, owed numerous other creditors in Portland, Or., San Francisco, Cal., and the Territory of Washington, various sums, aggregating, according to her statement, some twenty or thirty thousand dollars. Her creditors in Portland were pressing her for money, and the attachments of Murray and the bank had just been levied. Mrs. May was sick, and confined to her room. It does not appear what occurred between her and Mr. May; but on the evening of December 9th he left Yakima, and drove by team to The Dalles, Or., about ninety-five miles distant, found Snipes, and returned with him to Yakima, arriving back about 2 o'clock on the morning of the 11th. Between that time and the evening of the 11th the bill of sale and the deed were agreed upon, prepared, executed and delivered, Snipes

giving his check, payable to Mrs. May, for \$10,505. The auditor's office was then closed, but Snipes found the auditor and left the conveyances with him for record. They were recorded the following morning at 9 o'clock. Snipes left again for The Dalles on the night of the 11th; and May, with his wife's indorsement on the check, proceeded with such expedition that the check was paid December 13th by French & Co., bankers at The Dalles. The money, the proceeds of the check, was kept by May at The Dalles thereafter. Certain of the Portland creditors of Mrs. May, finding her without property or apparent means of paying their claims, agreed with her to a settlement of fifty cents on the dollar; thirty cents of which was to be paid in cash, to be produced by Mr. May at the proper time, and the balance in deferred notes. This settlement involved the payment of about \$5,000, and was carried out about the month of May, 1884, by one Williams, as agent of the creditors, at Yakima. The contract of compromise was prepared at Portland, and taken by Williams to Yakima. There, however, was difficulty in concluding it, as May did not have the money there. The business of the settlement was carried on by Williams, May, Snipes, and the counsel of the latter; Williams insisting that Snipes should pay the money, as otherwise the creditors would attach him on the ground that the sale by Mrs. May to him was fraudulent. May claimed that he could have the money in a few days, and it was finally agreed that Snipes should give his check for the amount necessary, but that it should not be presented for a certain number of days—time enough for May to produce the money. The check was given and paid, and the settlement made; and in due time May brought the money, in coin, to Snipes' place of business at The Dalles. Other creditors, who were not included in the settlement above mentioned, got judgment on their claims, and in December, 1884, brought this action to have the conveyances



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of Mrs. May declared to have been a fraudulent assignment, and for other appropriate relief. The testimony was taken before a referee, and, upon submission to the court, judgment was rendered for the defendants.

Appellants maintain that the decision should have been otherwise, upon several grounds, viz.: (1) Representations made by defendant Snipes to Mrs. May's creditors as to her solvency; (2) the circumstances of the transfer; (3) the conduct of the parties after the transfer, the property having been left entirely in the hands of the Mays; (4) the inadequacy of the consideration alleged to have been paid; (5) alleged credits which should have been made on the note; (6) the books of account, their condition, and the absence of some of them. Defendant Snipes was in Portland about November 30, 1883, only ten days before the transfer, and called upon several of the creditors of Mrs. May; told them she had asked him to see them about certain accounts against her which had been sent to Yakima for collection; assured them that she was perfectly solvent, if not pressed; that she owed him a small amount; that if he had any money to loan he would lend it to her as soon as to any one; and that, if he got money he expected shortly, he would advance enough to her to pay them. These statements were made for the purpose of quieting all the May creditors, and, had Murray been content like all the rest, the transfers might never have been made to Snipes; but they showed knowledge on the part of Snipes that Mrs. May had pressing creditors, whether he knew her actual financial condition or not. He denied such knowledge, and gave a somewhat different version of the Portland interviews; but we are constrained to conclude as above under the testimony. With the property under attachment in the Murray and National Bank suits, May, with little or no consultation with his wife, made the trip to The Dalles and return, traveling thirty-six hours without rest at the rate of

five miles an hour. His object was to borrow enough money from Snipes to pay off Murray and the bank, and thus relieve the pressure from other creditors. Snipes refused to make the loan, but, acting on the information conveyed to him by May, started back to Yakima with him at once to secure himself. He was preparing to attach, so as to be secured ahead of the Portland and other creditors except Murray and the bank, when the proposition was made by May to sell him the whole property. What terms the first proposal was based upon was not shown, but an agreement was very soon reached by which Snipes, in addition to his existing claim of upwards of \$20,000, should forthwith pay out nearly \$18,500 in cash. He might have attached, and, after paying out the Murray and bank claims would have saved his \$10,505 check, and whatever surplus there was after re-imbursing him would have gone to other creditors. The plan adopted gave him everything, and placed the \$10,505 out of the state, and beyond the reach of creditors, except by such chance as might favor them. In this proceeding we conclude that Snipes willingly assisted the Mays, both to prefer himself and to put other creditors at such a disadvantage as would compel them to accept such terms of settlement as might be offered, as was done in the case of creditors represented by Williams, thus hindering and delaying them. The deed and bill of sale having been executed and recorded, as was before stated, Snipes returned to The Dalles, and May went there also. No third person was put in charge of the property which was released from the attachments, and everything seemed to be in the possession of Mrs. May as before. But it was shown that whereas Mr. May had before managed the business and property as the agent of Mrs. May, he was now appointed to manage it as the agent of Mr. Snipes, with the exception that the mill was now managed by the miller. Mrs. May's name was painted out of the store

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sign, leaving the space blank. Business at the store was resumed, and goods sold for cash and on credit; accounts were collected, buildings were rented, farm products were gathered and sold, and in a few instances local creditors of Mrs. May were allowed to credit goods sold them upon their claims, with the knowledge and assent of Snipes. In like manner, in other instances notes held by Mrs. May at the time of the transfer were given to her creditors, and the proceeds allowed to be retained by them in satisfaction of their demands. No new goods were purchased, but Snipes did not pay any personal attention to matters, and rarely saw any of his property. It was said that new books were opened the next day after the transfer, but, although strenuously demanded at the hearing, they were not produced, with the exception of one, which will be alluded to further on. These books, however, were not claimed to have contained any statement of account between Snipes and his agent, May. No cash account whatever was kept. No agreement was made with May as to his compensation for his services as agent, and no settlement was ever made between the employer and his agent, although it was stated by Mrs. May that the money received was turned over to Mr. Snipes; but when, and how much, did not appear, and Snipes did not so testify. This state of things continued from December 11, 1883, until a certain day in June, 1885, when, owing to disagreements between May and his wife, he left Yakima never to return. A divorce was procured by her soon after; May going into the employ of Snipes elsewhere, and Mrs. May remaining at Yakima. The significant matter in this was that, although it was claimed that May was the agent, he went away, while the wife remained, and, without any word of arrangement between her and Snipes, went on with the business as though her husband had never been there. Mrs. May kept on gradually closing out the goods until

July, 1886, when a mere remnant remained, and when, with this remnant and \$600 in money, furnished her by Snipes, she removed to North Yakima, and set up a millinery and fancy goods store. This store, she testified, belonged to Snipes, she acting as his agent for a percentage of the profits, but what percentage she could not state; and the fact was that she conducted it as her own business, and advertised it in the papers as hers. But of this stock, even, goods were given to one of her old creditors on account until the testimony was being taken in this case.

From these facts appellants contend the proper deduction to be that the deed and bill of sale of Mrs. May were colorable only, and were intended, while they secured Snipes, to leave her to do practically as she pleased with the personal property, at least, and the rents and proceeds of the lots and land, without possibility of interference from her creditors. Concerning the value of the property, there was much controversy. The values fixed by the court below, however, were just what was admitted by the defendants, and nothing more, viz., the mill and appurtenances, \$5,000; the stock of goods, \$14,000; the other personal property, \$3,500; a total of \$22,500. It also allowed a balance on the books of Mrs. May against Snipes of \$5,939.48, but where this came from we are unable to ascertain. Nobody testified to it, or anything like it, except that Snipes said that was the amount agreed upon when the transfer was made. The only ledger produced by the defendants showed a balance of account due Mrs. May from Snipes, June 27, 1882, of \$9,325.24. The journal following immediately upon this ledger, and running to December 11, 1883, contained further charges against Snipes of \$4,530; and other memorandum account books covering the same period contained charges against him of \$840. These made a total of \$14,795.24. Upon the same journal and memorandum books appear credits to Snipes of \$7,945.50, including a

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disputed item of \$7,000. Deducting the credits from the charges, the balance is \$6,849.74, which seems to be correct, and made an error in Snipes' favor of \$910.26. Again, Snipes admitted that the merchandise he obtained from Mrs. May was to be credited upon his note; but no credit was ever made, and he was allowed interest on the whole principal to the date of the transfer (two years and nine months) at 1 per cent. per month, amounting to \$5,159.75. Had there been a careful settlement of the matter between the parties, each being mindful of his rights, this interest charge would have been reduced by nearly one-half. Next, although the transfer included all the accounts, etc., held by Mrs. May, no value whatever was allowed for them. On the face of the books presented, it was not disputed that some \$30,000 of charged accounts appeared, exclusive of those against Snipes, all, with the exception of about \$2,000, having been entered since June 27, 1882. The court below made no finding at all as to these accounts. They were of some value, for it was proven that certain of them were paid after the transfer; but we cannot undertake to say more than that they actually increased the value of the property to some extent. Lastly, the real estate. The court below estimated all of it, exclusive of that upon which the mill stood, at \$12,223, just \$2.25 less than the consideration expressed in the deed. There was no testimony whatever to support this valuation excepting that of Snipes, who fixed no value upon any parcel but the town lots. These he admitted to have been worth \$50 each, or \$3,300 for the sixty-six, and the improvements at \$1,500; and remarked that he paid more than lots and land were worth. The land amounted to about 400 acres, and cost him \$7,423, or \$18.55 per acre. Plaintiffs called five disinterested witnesses of the vicinity, fairly qualified to judge of the values of the real property. Of these the lowest gave the value of the land at \$13,000,

of the lots \$6,600, and of the improvements, \$6,400; making a total of \$26,000, as against \$12,225.25, admitted to have been paid. None of these witnesses fixed the total value of the property conveyed, exclusive of the book accounts, at less than \$48,960. In the face of such testimony we can see no reason why the statement of the defendants should have been accepted as verity, unaccompanied as it was with any particularization, and unsupported by any disinterested witness; and we conclude that the property conveyed was undervalued to the extent of at least \$20,000, so that Snipes, instead of paying \$10,500 to the Mays, should have paid nearly or quite three times that amount on any fair basis of calculation.

Mrs. May kept a set of merchantile books from the inception of her business in 1879 until the date of the transfer, December 11, 1883. From that time on, it was claimed, a new set of books was kept, at least until June, 1885, when her husband went away. Mr. May was the book-keeper. At the hearing before the referee, which commenced in February, 1886, and on May 4th thereafter, the referee ordered the defendants to produce their books. Various adjournments were had until July 30th before any books were forthcoming. Mr. May in the mean time testified that on May 30, 1884, three of the important books were taken from the store by some one unknown, and he was able to produce only Mrs. May's first ledger, covering her business from 1879 to June 27, 1882; her journal day-book from the last date to and including December 10, 1883; nineteen small memorandum books, from some of which the journal appears to have been posted, and the last of which stops with December 10; and one sale memorandum book, commencing December 12, 1883, and running to September 23, 1884, "Exhibit E." The ledger was well kept, and showed long and hard usage, and with a single exception the accounts in it ended July 27, 1882, and

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where they were unbalanced showed transfers to "Ledger B." But the account of Leonard Thorp was continued to the second of August following. The journal or day-book was a very much newer book, and had few signs of wear, though it covered a period of 16½ months, and had nearly 500 pages of entry. Appellants claim that this book was made up by defendant May between the time the books were called for in May, 1886, and the time when they were produced in July. This we think to be a well founded claim, based upon three grounds, viz.: At the head of several pages near the beginning of the book the year 1882 is written over the date 1883, a thing not likely to occur when a book is posted up with any regularity; some forty names of persons here and there appear with items charged or credited, and no amounts carried out, showing hasty work, and no posting to a ledger; and, lastly, the items in the ledger account of Leonard Thorp, which were presumably posted from this journal, on the debtor side, show them as transferred from pages 16, 27, 52, 57 and 59, whereas in the journal they appear on pages 11, 15, 36, 41 and 42, and on the credit side items from pages 6, 16 and 27 appear in the journal at pages 4, 11 and 19, showing almost to a demonstration that this journal has been shortened up, so that the business recorded in it does not occupy as many pages as the book from which the ledger was posted. But no great moment would be attached to these matters, since the journal in the main contains a correct transcript of the memorandum books, were it not that the item of \$7,000, alleged by Snipes to have been given to May, September 20, 1882, has no other support than that it appears on that date in the memorandum book No. 9, and at the corresponding place in the journal. No writing, whatever was taken by Snipes for this advance, and no time was stipulated for its return. The entry in the memorandum book

was made in lead-pencil, as were all the other entries in it, but this one was clearly made over other previous entries which were partially rubbed out with an eraser. It is at the top of the page, and the same entry was made on the bottom line of the same page, and partly rubbed and partly scratched out. Had the defendants been examined upon the condition of these books, and of this item especially, as it appears in the books, and had they given no reasonable explanation of the matter, we should reject the item of \$7,000 as fraudulent; but no question was asked them concerning it, and it will therefore stand. The way in which the defendant treated the matter of the books is one of the strongest proofs against them. From early in 1884 they knew that creditors were claiming their transaction of December 11, 1883, to have been fraudulent, and suits were pending against Mrs. May which were intended to be the basis of this suit. Snipes was a man of very large business affairs, with mills, stores, cattle and other property scattered over a large area in Oregon and Washington. He was not a book-keeper himself, and has no knowledge of accounts; but he knew the importance of them, and had his agents in other branches of his business keep them; and it is beyond conception that in so questionable a transaction as this was on the face of it, he should entirely have neglected so important an element of defense by suffering honestly kept books of accounts to be lost when there was a very expensive safe among the very property turned over to him. This concludes the review of the main facts as disclosed by the evidence.

The law of the case is very simple. It is that, when such facts are shown to exist, they tend to prove a legal fraud upon creditors; and when many such facts exist together, each with its tendency to prove fraud, they compel the belief that a fraud was intended by the Mays, and was



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assisted in by Snipes. If it were otherwise, the defendants, though having the opportunity, wholly neglected to explain any of the many damaging circumstances appearing against them. Therefore the judgment of the lower court must be reversed. The judgment will be that the bill of sale and deed of December 11, 1883, be declared null and void as against the appellants' several judgments; that the property covered thereby, and still remaining in the hands of the defendants, or either of them, and not transferred to innocent third parties, or so much thereof as may be necessary, be sold, and the proceeds paid to the appellants according to their said judgments; that if the said proceeds of sale shall not be sufficient to pay said judgments, then the said defendant Snipes is adjudged to be liable for the deficiency to the extent of \$17,500, being the admitted value of personal property received by him, with interest thereon at the rate of 10 per cent. per annum from December 11, 1883, and upon the ascertainment of the amount of said deficiency, if any, execution may issue against the property of said Snipes therefor. Costs to appellants.

ANDERS, C. J., and HOYT, DUNBAR, and SCOTT, JJ.,  
concur.

[No. 131. Decided March 12, 1891.]

C. EISENBACH, J. S. PIERCE, EDWARD HOARE, SAMUEL  
C. WHEELWRIGHT, HUGH GLENN, JR., *et al.* v. E. H.  
HATFIELD.

RIPARIAN RIGHTS—TIDE LANDS—WHARVES AND DOCKS—ACCRE-  
TION—INJUNCTION.

The tide lands of the State of Washington belong to the state, which has full power to dispose of them subject only to the restrictions imposed by the constitutions of the state and of the United States; and no individual can claim any easement in, or impose any servitude upon, the tide waters of the state without the consent of the legislature.

A riparian proprietor on the shore of the sea or its arms has no rights, as against the state or its grantees, to extend wharves in front of his land below high water mark.

Under article 15 of the state constitution, requiring the legislature to provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors of the state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof; and, further, to provide general laws for the leasing of the right to build wharves, docks and other structures upon certain designated areas, or to provide by general laws for the building and maintaining of wharves, docks, and other structures upon such areas, a riparian proprietor within a mile of the corporate limits of any city has no right to extend wharves in front of his land below high water mark except by permission of the state.

The act of the territorial legislature of 1854, authorizing bank owners to build wharves in front of their premises, was but a license and, until availed of, was revocable; and the constitution and subsequent laws have abrogated the act.

The right of a riparian owner to future accretions to his land is not a vested right, as there can be no present vested right in that which may never have an existence.

The building by the state or its grantees of wharves upon shores of navigable waters is neither a taking nor a damaging of private property for public use.

A riparian proprietor cannot maintain injunction against the owners of valuable improvements in actual use for commerce, trade and business, made on tide lands in front of his premises prior to March 26, 1890, as, by the Laws 1889-90, p. 435, § 11, the owners of such improvements are given the exclusive right of pur-

2	236
2	304
2	399
2	400
2	406
2	533
2	535
2	236
5	159
26*	539
31*	462
2	236
7	119
8	492
8	703
26*	539
34*	427
36*	441
36*	972
2	236
11	233
26*	539
39*	686
2	236
21	424
2	236
24	501
2	236
27	605

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chase of the land so improved for a period of sixty days after their final appraisal by the state.

(STILES, J., dissents.)

*Appeal from Superior Court, Pierce County.*

Suit for injunction brought by E. H. Hatfield against C. Eisenbach, J. S. Pierce, Edward Hoare, Samuel C. Wheelwright, Hugh Glenn, Jr., Twyman O. Abbott, John Smith, John Doe, and Richard Roe.

After the complaint was filed, and a temporary order issued, plaintiff filed an amended complaint, which alleged, in substance, that he was the owner of certain upland bordering and abutting upon the high water mark of Puget Sound; that by reason of such ownership he was entitled to certain littoral rights in and to the shore opposite his lands, and that the appellants were occupying the shore opposite his land, and erecting structures and improvements thereon. Defendants filed an answer disclaiming any right or title to any land above high water mark, and alleging that the land occupied by them is part of the shore of Puget Sound, and that valuable improvements, in actual use for commerce, trade and business had been made upon said lands long prior to the passage of the tide lands act of March 26, 1890, and that said improvements were on March 26, 1890, and prior thereto, in actual use for commerce, trade and business, and that the defendants are the owners of and in possession of such improvements; and alleging the purpose of the appellants to erect on said shore conveniences for shipping, and that the plaintiff would have the right, in common with all other persons, and upon the same terms, to use such conveniences when erected; and denying that the plaintiff had been denied access from his lands to the navigable waters of Puget Sound for any purposes of commerce or navigation; and denying that the appellee has desired access to or egress from the waters of Puget Sound for any purpose of commerce or

navigation ; and alleging that the harbor lines have not been fixed opposite said lands, and that the lands have not been disposed of by the State of Washington ; and denying that the appellants have wrongfully or unlawfully obstructed plaintiff's access to the navigable waters of Puget Sound. To this answer plaintiff demurred, on the ground that the same did not state facts sufficient, and this demurrer was sustained. Defendants declined to answer further, and a final decree of perpetual injunction was made, from which defendants appeal.

*Calkins & Shackelford*, for appellants.

The owner of upland abutting upon an arm of the sea where the tide rises and falls has no riparian rights. Such land in England belongs to the king, in America to the state. There are no riparian rights in the ocean. *Pollard v. Hagan*, 3 How. 212; *Martin v. Waddell*, 16 Pet. 410; *Boston v. Lecraw*, 17 How. 426; *Hoboken v. Pennsylvania R. R. Co.*, 124 U. S. 656; *Martin v. O'Brien*, 34 Miss. 21; *State v. Mayor, etc., of Jersey City*, 25 N. J. Law, 525; *Stevens v. P. & N. R. R. Co.*, 34 N. J. Law, 532 (3 Am. Rep. 269); *Galveston v. Menard*, 23 Tex. 393; *Parker v. Taylor*, 7 Or. 435; *De Force v. Welch*, 10 Or. 507; *Lansing v. Smith*, 8 Cow. 146; *People v. Vanderbilt*, 26 N. Y. 287; *Towle v. Remsen*, 70 N. Y. 303; *Langdon v. Mayor*, 93 N. Y. 155; *Com. v. Alger*, 7 Cush. 53; *Clancey v. Houdlette*, 39 Me. 451.

The State of Washington is the owner of the shore and of tide lands. Const. of Wash., art. 15 and 17. The State of Washington by its act of March 26, 1890, providing for the sale of shore lands, has recognized the right of the appellants to occupy the shore, and has given them the first right to purchase. Laws 1889-90, p. 431. Every state adopts its own rules and makes its own laws for the sale and disposition of tide and shore lands. This question is one for the state exclusively, and one in which congress and the United States courts can take no part. *Bar-*

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Argument of Counsel.

*ney v. Keokuk*, 94 U. S. 324; *City of St. Louis v. Myers*, 113 U. S. 566.

*Doolittle, Pritchard, Stevens & Grosscup*, for appellee.

The owner of land abutting upon the navigable waters of an arm of the sea, by virtue of such ownership and the appurtenances to his land, has certain natural rights called riparian or littoral rights, consisting of the free and undisturbed access from the front of his land to such navigable waters, and incidentally the right to facilitate such access by the erection of wharves and piers. *Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Metropolitan Board of Works v. McCarthy*, 7 H. L. 243; L. R. 1 App. Cases, 662; *Yates v. Milwaukee*, 10 Wall. 497; *Railroad v. Schurmeir*, 7 Wall. 272; *Dutton v. Strong*, 1 Black, 23; *Case v. Toftus*, 39 Fed. Rep. 730; *Weber v. Board of Harbor Commissioners*, 18 Wall. 57; *Railway Co. v. Renwich*, 102 U. S. 180; *Tuck v. Olds*, 29 Fed. Rep. 738; *State v. Ill. Cent. R. R. Co.*, 33 Fed. Rep. 730; *Bowman's Devises v. Wathen*, 2 McLean, 376. Favoring our position are decisions of various state courts. In Oregon, *Wilson v. Welch*, 12 Or. 353; *Parker v. West Coast Packing Co.*, 17 Or. 510 (21 Pac. Rep. 822). In California, *Shirley v. Bishop*, 67 Cal. 543 (8 Pac. Rep. 82). In Rhode Island, *Clark v. Peckham*, 10 R. I. 35 (14 Am. Rep. 654). In Wisconsin, *Delaplaine v. C. & N. W. Ry. Co.*, 42 Wis. 214 (24 Am. Rep. 386); *Boorman v. Sunnuchs*, 42 Wis. 243; *Diedrich v. N. W. R. R.*, 42 Wis. 248 (24 Am. Rep. 399); In Minnesota, *Carli v. Stillwater St. R. R. Co.*, 28 Minn. 373 (41 Am. Rep. 290); *Brisbine v. St. Paul & Sioux City R. R. Co.*, 23 Minn. 114; *Miller v. Mendenhall*, 43 Minn. 95 (19 Am. St. Rep. 219; 44 N. W. Rep. 1141). In New Hampshire, *Clement v. Burns*, 43 N. H. 609. In Missouri, *Meyers v. City of St. Louis*, 8 Mo. App. 266; *Myers v. City of St. Louis*, 82 Mo. 367. In Pennsylvania, *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21 (100 Am. Dec. 597); *Pittsburgh v.*

*Scott*, 1 Barr, 314. In Michigan, *Rice v. Ruddiman*, 10 Mich. 125; *Bay City Gas Light Co. v. Industrial Works*, 28 Mich. 182; *Pere Marquette Boom Co. v. Adams*, 44 Mich. 404; *Watson v. Peters*, 26 Mich. 517; *Lorman v. Benson*, 8 Mich. 18 (77 Am. Dec. 435); *Lincoln v. Davis*, 53 Mich. 375 (51 Am. Rep. 116). In Connecticut, *Mather v. Chapman*, 40 Conn. 382 (16 Am. Rep. 46); *State v. Sargent*, 45 Conn. 358. In Maine, *Moulton v. Libbey*, 37 Me. 472 (59 Am. Dec. 57); *Welles v. Bailey*, 55 Conn. 292 (3 Am. St. Rep. 48; 10 Atl. Rep. 565). In Maryland, *Baltimore & Ohio R. R. Co. v. Chase*, 43 Md. 23; *State v. Mayor*, 52 Md. 422.

The opinion of the court was delivered by

ANDERS, C. J. — In this case this court is called upon for the first time to determine the rights of littoral proprietors of lands abutting upon the shore of an arm of the sea in which the tide ebbs and flows; and, while it is scarcely necessary to look beyond our own constitution and laws for authority to guide us to a conclusion, still, owing to the importance of the questions both to individuals and the public, and the magnitude of the interests involved, we have examined the numerous authorities cited by the learned counsel for the respective parties in the elaborate briefs which they have filed, in order that we might familiarize ourselves with the decisions of other courts upon the subject, and with the reasons upon which their decisions are based. We shall not attempt, however, to review all of the decisions in detail, for that would be impracticable, if it were desirable, but will only refer to a few of the cases especially alluded to by counsel.

In this state the common law is our rule of decision in the settlement of questions requiring judicial determination, when not specially provided for by statute. And it seems to be generally conceded that at common law the title to the soil under tide water was vested in the crown. The ownership of the soil was regarded as a *jus privatum*, and

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could be conveyed to individuals, subject only to the public right of navigation and fishing, which public right was under the absolute control of parliament. In this country we have the highest authority in support of the doctrine that the state has succeeded to all the rights of both king and parliament, and hence is the absolute owner of all navigable waters and the soil under them within its territorial limits.

This question was thoroughly discussed by the supreme court of the United States in the case of *Martin v. Waddell*, 16 Pet. 367. That was an action of ejectment for land under the waters of Raritan Bay in New Jersey, over which the tide ebbed and flowed. The land in controversy was included in a large tract which was granted by the King of Great Britain to the Duke of York, and subsequently became vested in the proprietors of East Jersey, who afterwards surrendered to the crown all their governmental powers, but retained all their rights of private property. One of the parties to the action, as the grantee of the state of New Jersey, under a law of the state, claimed the exclusive right to take oysters in the place granted, and the other claimed the same right by virtue of his title from the proprietors. The right of the crown to make the grant to the Duke of York, which not only included the tide land, and also the waters and soil under the waters, as well as the power of the state to convey the same, were questions thus brought directly before the court for determination; and it was held that the king, as the representative of the nation, had an unquestionable right to make the grant to the Duke of York, with all the prerogatives and powers of government therein contained. In discussing the question as to whether, since *Magna Charta*, the king had power to grant land covered by navigable waters to an individual, so as to give him an exclusive right of fishing within the limits of the grant, Mr. Chief Justice TANEY said:

“And we the more willingly forbear to express an opinion on this subject because it has ceased to be a matter of

much interest in the United States; for, when the revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government. A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to the grants of the British crown."

The natural and logical conclusion of the court was that the grant by the state conferred upon its grantee the exclusive right to take oysters within the territory covered by the grant.

The question of the ownership of lands under tide water was again raised in the same court in the case of *Pollard's Lessee v. Hagan*, 3 How. 212, which was ejectment for a lot of land in the city of Mobile, in Alabama, which lay below high water mark, and which had been granted to plaintiff by congress. After approving the decision in the case of *Martin v. Waddell*, Mr. Justice MCKINLEY, in the course of his opinion, says:

"Then to Alabama belong the navigable waters, and the soils under them, in controversy in this case, subject to the rights surrendered by the constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights."

The court further says that, "by the preceding course of reasoning, we have arrived at these general conclusions—(1) The shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the states, respectively; (2) the new states have the same rights, sovereignty and jurisdiction over this subject as the original states; (3) the right of the United States to public lands, and the power of congress to make all needful rules and regulations for the sale and disposition thereof, conferred no



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power to grant to the plaintiffs the lands in controversy in this case.”

Again, in the case of *Weber v. Board of Harbor Commissioners*, 18 Wall. 57, it was held that to the State of California, upon her admission into the union, passed the absolute property in and dominion over all soils under tide water within her limits, with the consequent right to dispose of the title to any part thereof in such manner as the state might deem proper, subject to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations and among the several states, the regulation of which was vested in the general government. Opinion of Mr. Justice FIELD, at page 65.

The court went still further in the case of *McCready v. Virginia*, 94 U. S. 391, and there held that not only the soil under tide waters in the state, but the waters themselves, and the fish in the waters, so far as they are capable of ownership, belonged to the state, and that the legislature had the constitutional right to pass a law prohibiting any person not a citizen of the state from fishing in such waters. And in *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, the court sustained an act of the legislature of Delaware authorizing the damming up of a navigable stream for the benefit of adjoining lands.

The case of *Hoboken v. Penn. R. R. Co.*, 124 U. S. 656 (8 Sup. Ct. Rep. 643), was an action of ejectment for land occupied by the railroad company along the margin of the Hudson river. Plaintiff claimed by dedication of the street to the water by the original proprietor of the land, as evidenced by the “Loss” map. Defendant claimed by virtue of a grant from the state. Mr. Justice MATTHEWS, speaking for the court, said :

“The nature of the title in the state to lands under tide water was thoroughly considered by the Court of Errors

and Appeals of New Jersey in the case of *Stevens v. Patterson & Newark R. R. Co.*, 34 N. J. Law, 532 (3 Am. Rep. 269). It was there declared (page 549) 'that all navigable waters within the territorial limits of the state, and the soil under such waters, belonged in actual propriety to the public; that the riparian owner, by the common law, has no peculiar right in this public domain as incidents of his estate; and that the privileges he possesses by the local custom, or by force of the wharf act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature. The result is that there is no legal obstacle to a grant by the legislature to the defendant of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high water mark.' It was therefore held in that case that it was competent for the legislative power of the state to grant to a stranger lands constituting the shore of a navigable river under tide water, below the high water mark, to be occupied and used with structures and improvements in such a manner as to cut off the access of the riparian owner from his land to the water, and that without making compensation to him for such loss."

And again :

"Our conclusion, therefore, is that the grants from the state of New Jersey, under which the defendants claim, respectively, are a complete bar to the recovery sought against them in these suits."

And finally :

"Under these grants they have and hold the rightful and exclusive possession of the premises in controversy against the adverse claim of the plaintiff to any easement or right of way upon and over them, by virtue of the original dedication of the streets to high water mark on the Loss map."

The foregoing decisions of the highest judicial tribunal of the United States, without other or further authority, would seem to settle, beyond controversy, the question of title to the tide lands of this state, and to leave no doubt whatever that they belong to the state in actual propriety,

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and that the state has full power to dispose of the same, subject to no restrictions save those imposed upon the legislature by the constitution of the state and the constitution of the United States; and, if this be true, it necessarily follows that no individual can have any legal right whatever to claim any easement in, or to impose any servitude upon, the tide waters within the limits of the state, without the consent of the legislature.

But, in order that there might be no doubt upon this vexed question, the constitution of the state has spoken upon the subject. Sec. 1, art. 17 of that instrument, declares that "the State of Washington asserts its ownership to the beds and shores of all navigable waters in the state, up to and including the line of ordinary high tide, in the waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided*, That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state." And so zealous were the people of the state in guarding their rights in these lands that they inserted a proviso in the constitution to the effect that no law of Washington Territory, granting shore or tide lands to any person, company, or any municipal or private corporation, should be deemed valid. Const., art. 17, § 2.

Appellee contends, however, that whatever may be the title of the state to the soil under tide water, he, by virtue of his contiguity to the water, has certain rights in the shore beyond those of the general public, and which are peculiar to himself, among which are a right to wharf out opposite to his upland, a right of ferriage, a right of unobstructed access to the navigable water in front of him, and a further right to accretions that may hereafter be formed, and that all of these rights are property, and are "vested rights." And in support of this contention the learned

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counsel for appellee have cited many authorities, among which are *Dutton v. Strong*, 1 Black, 23; *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Yates v. Milwaukee*, 10 Wall. 497. But, before proceeding further, it may be proper here to observe that riparian rights in the several states are settled by the respective states for themselves. See *St. Louis v. Myers*, 113 U. S. 566 (5 Sup. Ct. Rep. 640); *Barney v. Keokuk*, 94 U. S. 324; *Willson v. Marsh Co.*, 2 Pet. 245.

In *Dutton v. Strong*, cited by appellee as an authority in favor of his right to wharf out against his premises, the facts before the court were as follows: The defendant in the court below had constructed a landing or bridge pier in front of his premises, extending to the navigable waters of the lake. Plaintiff's vessel was moored to this pier in a storm and, by force of a gale, was about to pull down and destroy defendant's structure, when he, after requesting the master of the vessel to detach the same, but who refused to do so, cut the hawser, whereby the ship was set adrift and sunk. Plaintiff sued for the resulting damage. The court held that the defendant had a right to erect the pier where it was, and to protect the same by cutting the vessel's fastenings, even although it was thereby exposed to destruction. Speaking of the origin of riparian rights in this country, Mr. Justice CLIFFORD said:

"Our ancestors when they immigrated here undoubtedly brought the common law with them as part of their inheritance; but they soon found it indispensable in order to secure these conveniences, to sanction the appropriation of the soil between high and low water mark to the accomplishment of these objects. Different states adopted different regulations upon the subject, and in some the right of the riparian proprietor rests upon immemorial local usage. No reason is perceived why the same general principle should not be applicable to the lakes, although those waters are not affected by the ebb and flow of the tide."

We have no doubt of the correctness of that decision,

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and this court would undoubtedly follow it in a similar case.

The case of *Railroad Co. v. Schurmeir* involved the title to land on the Mississippi river at St. Paul. Schurmeir's premises were bounded by high water mark of the river, but the land in front had been filled in and built upon, down to extreme low water mark; and it was held that he had a right, as riparian proprietor, to the reclaimed land, as against the railroad company. And, at page 289, Mr. Justice CLIFFORD said:

“Although such riparian proprietors are limited to the stream, still they also have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as is accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide.”

But it will be remembered that the same learned judge said in *Dutton v. Strong* that different states adopted different regulations upon the subject; and no doubt the decision of the case was in no way in conflict with the “regulations” of Minnesota.

The question before the court in *Yates v. Milwaukee* was as to the validity of an ordinance of the city of Milwaukee declaring a wharf belonging to Yates a nuisance; and it was remarked by Mr. Justice MILLER, in speaking generally of riparian rights on navigable streams, that, whether the title of such owner extended beyond the dry land or not, he has the right of access to the navigable part of the river, and to make a landing, wharf or pier for his own use, or that of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever they may be, and that it is a valuable right and property, and a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation.

But if the court in these cases really intended to say that the same rule applied to the shore of the sea, or the arms of the sea, and that a riparian proprietor has a right as against the state to erect wharves extending below high water mark, we cannot see how these can be reconciled with other decisions of the court, especially with that of *Hoboken v. Railroad Co.*, *supra*. But it would seem, however, that the court in the later case of *Weber v. Commissioners* did make a distinction between tidal and non-tidal waters; for in that case Mr. Justice FIELD, after approving the doctrine laid down in *Yates v. Milwaukee*, says:

“Nor is it necessary to controvert the proposition that in several of the states, by general legislation or immemorial usage, the proprietor whose land is bounded by the shore of the sea, or of an arm of the sea, possesses a similar right to erect a wharf or pier in front of his land extending into the waters to the point where they are navigable. In the absence of such legislation or usage, however, the common-law rule would govern the rights of the proprietor, at least in those states where the common law obtains. By that law the title to the shore of the sea and of the arms of the sea and in the soils under tide waters is, in England, in the king, and in this country in the state. Any erection thereon without license is therefore deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a purpresture, which he may remove at pleasure, whether it tend to obstruct navigation or otherwise.”

We think the above is a correct statement of the law applicable to riparian rights on tide waters, and that it is fully supported by the authorities. Gould, *Waters*, § 167, and cases cited; *Com. v. Alger*, 7 Cush. 53; *Dana v. Wharf Co.*, 31 Cal. 118 (89 Am. Dec. 164); *Martin v. O'Brien*, 34 Miss. 21. And in this connection it must not be forgotten that in the cases of *Dutton v. Strong*, *Railroad Co. v. Schurmeir*, and *Yates v. Milwaukee*, as well as that of *Case v. Toftus*, 39 Fed. Rep. 730, also cited by counsel, the respective ri-

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parian proprietors had already erected their improvements, presumably with the license of the state, and therefore had vested rights of property which it was proper to recognize and protect. This seems to have been the view of Mr. Gould, for, in a note to § 149 of his work on waters, in which he quotes from the opinion of the court in the case of *Yates v. Milwaukee*, he uses this language:

“In this case the wharf which it was attempted to condemn as a nuisance was actually built.”

In *Ravenswood v. Flemings*, 22 W. Va. 52 (46 Am. Rep. 485), which is a well considered case, it was held, under a law of that state, that a riparian proprietor on a navigable river had no right to build a wharf, ferry or bulk-head, below high water mark, without the consent of the town council, and that he might be prevented from so doing by injunction. And in *Com. v. Alger, supra*, the court, in a most learned and elaborate opinion by Chief Justice SHAW, sustained an indictment against the defendant for extending a wharf beyond the harbor line in the city of Boston, on his own land; and, further, that the statute establishing harbor lines, and taking away the rights of proprietors of flats in the harbor beyond the lines, to build wharves thereon, even when they would be no injury to navigation, and providing for no compensation to such proprietor, was not unconstitutional as taking private property for public uses without compensation.

We think the authorities abundantly show that a riparian proprietor on the shore of the sea, or its arms, has no rights as against the state or its grantees to extend wharves in front of his land below high water mark.

But, if this were not so, we would still be constrained to hold that appellee has no such rights; for the constitution of the state, which is the supreme law of the land, expressly declares that the legislature shall provide for the appointment of a commission, whose duty it shall be to locate and

establish harbor lines in the navigable waters of all harbors of the state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof, upon either side; and, further, that the legislature shall provide general laws for the leasing of the right to build wharves, docks and other structures, upon certain designated areas, or the legislature may provide by general laws for the building and maintaining, upon such area, wharves, docks and other structures. Const., art. 15. Nor can the right to wharf out be claimed under the act of the territorial legislature authorizing bank owners to build wharves in front of their premises. That act was but a license, at most, and, until availed of, was revocable, and the constitution and subsequent laws have abrogated the law.

But appellee claims that he has a vested right to future accretions to his land, and cites as authority to sustain his position the case of *County of St. Clair v. Lovington*, 23 Wall. 46. And the court in that case does say that the riparian right of future accretions is a vested right. But we are unable to see how one can have a present vested right to that which does not exist, and which may never have an existence. It seems to us that the more reasonable doctrine is announced in the case of *Taylor v. Underhill*, 40 Cal. 471, in which case the court says:

“The plaintiff, as a riparian owner, has also a right to accretions to his land, and it is said the claim of defendant will be a cloud upon his title to such accretions. But, as yet, there is no such property, and there may never be. He cannot ask the court to interfere in advance, and prevent a cloud being cast upon his title to that which may never had an existence.”

The case of *Railway Co. v. Renwick*, 102 U. S. 180, cited by appellee, was an action for damages by a riparian proprietor on account of the building of a railroad along the Mississippi river in front of his premises. The court



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held that the plaintiff could recover, but placed its decision upon a statute of Iowa (1874), providing for compensation to riparian owners in such cases. Previous to this statute it was held in the case of *McManus v. Carmichael*, 3 Iowa, 1, after an exhaustive review of the authorities, that the title of riparian owners extended only to high water mark; and in the case of *Tomlin v. Railroad Co.*, 32 Iowa, 106, 109 (7 Am. Rep. 176), the court held that "the doctrine deducible from adjudged cases is that, by the rules of the common law, the owner of land along the shore of a navigable river is entitled to no right, either in its shores or waters, as an incident of his ownership, except the contingent ones of *alluvion* and *derelictum*. Hence he is not entitled to damages for an improvement made along the banks of such river, by authority of the state, the effect of which is to deprive him of free access to the stream."

The same question was before the court of appeals of New York in the case of *Gould v. Railroad Co.*, 6 N. Y. 522, and was decided the same way. In that case the court, quoting *Lansing v. Smith*, 4 Wend. 9 (21 Am. Dec. 89), said:

"The bank of the Hudson river, between high and low water mark, belonged to the people, and the riparian proprietor had no better right to the use of it than any other person. If he built on it or erected a wharf there, it would be a purpresture, which the legislature might direct to be demolished, or to be seized for the use of the public. Or the legislature might authorize erections in front thereof, as in case of Smith's wharf on the Thames."

And in *Stevens v. Railroad Co.*, 34 N. J. Law, 532 (3 Am. Rep. 269), it was held that, although an owner of land adjacent to navigable water is more conveniently situated for the enjoyment of the public easement than others, he has, by virtue of common law, no more or greater rights than the rest of the community. In *Langdon v. Mayor*, 93 N. Y. 129, 155, it was said that the legislature of the state, where not restrained by constitutional inhibitions, could authorize a

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boom to be placed across the Hudson river for private use, and that the right of the state to grant the navigable waters, except as restrained by constitutional checks, is as absolute as its rights to grant the dry land which it owns, and that the state holds the public domain as absolute owner, and not as a trustee, except as it is organized, and possesses all its powers and property for the public benefit. See, also, Wood, Nuisances (2d ed.), 538, and notes.

Many decisions of the various state courts have been cited by appellee as sustaining a contrary doctrine to that of the above cases, but we find, upon examination, that they are mostly (especially those referring to riparian rights in tide waters) based either upon statutes or local customs, and are therefore not precedents binding upon us. Our attention is also called to the English cases of *Buccleuch v. Board of Works*, L. R. 5 H. L. 418, and *Lyon v. Fishmongers' Co.*, 17 Moak, Eng. R. 51, only the latter of which, however, we have had an opportunity to examine; and in that case the principal question involved was the construction of an act of parliament which distinctly recognized riparian rights in the owner, and which provided (§ 179) that "none of the powers by this act conferred, or anything in this act contained, shall extend to take away, alter or abridge any right, claim, privilege, franchise, exemption or immunity to which any owner or occupier of any lands, tenements or hereditaments on the banks of the river, including the banks thereof, or of any aits or islands in the river, are now by law entitled, nor to take away or abridge any legal right of ferry, but the same shall remain and continue in full force and effect as if this act had never been made." The statute is a very broad and comprehensive one; and, as it was not questioned but that Lyon's wharf was erected and used where it was in accordance with the law, the owner was entitled to the "privilege" of continuing to use it, as against the Fish-

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mongers' Company, "as if the act had never been made." Indeed, it was conceded in argument that he had a right of access from the river to the front of his wharf, but it was contended that he had no such right as to the side next Winckworth's Hole, which was merely an inlet from the river. The court held otherwise; and its conclusion was evidently in accordance with the provisions of the act in question, although at variance with the earlier common-law doctrine, as laid down by Lord MANSFIELD in *Rex v. Smith*, 2 Doug. 425, in which that eminent jurist held that the king might authorize the erection of a structure in front of defendant's premises, between high and low water mark in the river Thames, even though the defendant was thereby cut off from the use of his wharf.

The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the state to deal with its own property as it may deem best for the public good. If the state cannot exercise its constitutional right to erect wharves and other structures upon its public waters in aid of navigation without the consent of adjoining owners, it is obviously deficient in the powers of self-development, which every government is supposed to possess—a proposition to which we cannot assent. See *Galveston v. Menard*, 23 Tex. 349. Nor do we think this view in any way conflicts with the constitution of the state, but, on the contrary, we believe it is in strict harmony with it, when all its parts are construed together. We cannot think that the building by the state or its grantees of wharves upon shores of navigable waters would constitute either a taking or damaging of private property for public use, in contemplation of the constitution. See *Com. v. Alger*, *supra*.

The next question to be considered is, by what right, if

any, do appellants occupy the shore in front of appellee's premises? And in considering this question it must be remembered that the demurrer in this case admits that they have thereon valuable improvements in actual use for commerce, trade and business, and that said improvements were on said lands on March 26, 1890, the date of the passage of the tide land act; that said lands are within one mile of the corporate limits of the city of Tacoma; that the harbor lines have not been fixed opposite to said lands; and that the same have not been disposed of by the state. Appellee has never erected any improvements on the shore, but claims that the appellants are trespassers, and that, as against them, he is entitled to relief by injunction. On the other hand, appellants claim to be rightfully in possession of the disputed lands by authority of the act of the legislature above mentioned. Section 11 of this act provides that "the owner or owners of any lands abutting or fronting upon or bounded by the shore of the Pacific Ocean, or of any bay, harbor, sound, inlet, lake or water-course, shall have the right for sixty (60) days following the filing of the final appraisal of the tide lands, to purchase all or any part of the tide lands in front of the lands so owned: *Provided*, That if valuable improvements, in actual use for commerce, trade or business, have been made upon said tide lands by any person, association or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved for the period aforesaid: . . . *Provided*, That nothing in this act shall be so construed to apply to any improvements made after the passage of this act."

We think, by a fair construction of this statute, that appellants are rightfully in possession of the disputed premises and have a right to maintain their improvements as they were on March 26, 1890, but that they have no right to enlarge their erections prior to such time as they

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may be authorized to purchase the lands from the state. For the foregoing reasons the judgment of the court below is reversed, and the cause remanded for further proceedings in accordance with this opinion. So ordered.

HOYT, SCOTT, and DUNBAR, JJ., concur.

STILES, J. (*dissenting*).—The plaintiff in the superior court, the appellee here, alleged ownership of lots 15, 16 and 17, in blocks 1 and 2, in Wallace's addition to the city of Tacoma; that his lots had a water frontage on Puget Sound, a navigable arm of the sea, for a distance of more than one hundred and fifty feet; that defendants had, about May 1, 1890, taken exclusive possession of the shore in front of his lots, including all the area between high and low water marks, and had placed certain obstructions in the way of his access to the water, and were threatening to increase the obstructions, and refused him any access to the water from his land, or to permit him to enjoy any of his riparian rights. The prayer of the complaint was for a mandatory injunction to secure the removal of the obstructions. The answer admitted plaintiff's ownership to high water mark, but denied his right of access and all other riparian rights; admitted taking possession of the shore; claimed improvements in actual use for commerce, trade and business on March 26, 1890, and prior thereto, and the right to purchase the land improved under the act of that date; and alleged the distance between high and low water marks to be not exceeding two hundred and fifty feet, and from high water to water of the depth of five fathoms to be four hundred feet. The court below sustained a demurrer to the answer, and the opinion of this court has reversed the ruling.

I think the demurrer should have been sustained—*First*, for the reason that the allegations of the answer, intended to show improvements March 26, 1890; were not

the statements of any fact, but conclusions of law; and, *secondly*, on the main question, because the law of the case is different from that announced by the court in its decision.

This is the first instance in the recorded history of English or American law where private persons, for private ends, have been sustained by a court in taking and maintaining permanent possession of the shore of an arm of the sea, or of any navigable water, to the exclusion of the owner of the bank from passing over it to the water; and if the act of March 26, 1890, has the effect ascribed to it, it is the first act of an English or American legislature, not excepting those of New York and New Jersey, which has ever done so much. The public right in navigable waters, and to the soil underlying them, have been freely regulated and disposed of by both parliament and the legislatures; but both have held sacred the rights admitted to exist in connection with the lands bordering the waters, whether with or without constitutional rules against taking private property without compensation. These rights have been regulated in divers ways proper to their locality, according to the complicated necessities of crowded harbors or the unfrequented shores of remote waters; but while it is true that a few courts have theoretically denied, many have actually upheld them, and no other legislature has ever ignored them. Even the act of the legislature of New York, in 1840, which gave rise to the case of *Gould v. Railroad Co.*, 6 N. Y. 548, made the most ample provision for draw-bridges, so as to continue navigation in bays and streams cut off by the railroads, and for the extension of wharves and docks across the tracks to the river beyond; all of which was in obedience to the settled policy of the state, inaugurated in 1786, which prohibited the sale of any shore lands to other than riparian owners. *Rumsey v. Railroad Co.*, 114 N. Y. 423 (21 N. E. Rep. 1066). Of the other old states, every one, from the Massachusetts colony in 1641

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down to New Jersey in 1848 and 1869, has similar provisions to those of New York, and a similar policy. Of the younger states, while some have no provisions by statute on the subject, every one which has a statute yields to the shore owner the right to wharf, and in the great majority of the others the courts have held such a right to exist whenever the question has been presented. I know this argument proves nothing in the face of the claim that it is for every state to settle for itself, through its legislature, what its policy in this regard will be. I adduce it merely by way of offering a reason why this court should be slow to conclude that the effect of the act of 1890 was, and was intended to be, what it has now been decided to be.

We are not a new people. As an organized community we date from 1853. True, the sovereignty was withheld until 1889; but, upon the faith of a policy adopted and placed among the statutes of the territory in 1854, lands were acquired upon the shores of our navigable waters, and improvements made at great cost by private persons—improvements which had a large share in making it possible for Washington to become a state, but which the principle of the court's decision would render it possible for the very next legislature to sweep out of existence or confiscate without compensation. This was a territorial statute, it is true; but the territory was competent to frame, and did frame, policies in a hundred other particulars between which and this I can see no distinction. If Massachusetts, in 1641, when a mere colony of Great Britain, could absolutely grant away the soil beneath the waters, so as to bind her when she became a state, as well as the states of Maine and New Hampshire; and if the provincial governor of New York could, in 1689, grant to the city of New York the fee of the shore between high and low water marks, whereon are now based some of the most valuable titles in that city and in the world—it would seem to be no

great violation of common sense to say that the Territory of Washington could lawfully legislate to the extent of the act of 1854. And who has ever questioned the title to shore lands under the Massachusetts ordinance, or under the Dongan charter of 1689?

But it is said that the constitution, or the act of 1890, or both together, have repealed the act of 1854. Let us see. In the schedule of the constitution (art. 27, § 2), in obedience to the last clause of § 24 of the enabling act, it was provided that all laws in force in the territory, not repugnant to the constitution, should remain in force until they expired by limitation or were repealed by the legislature; and then there was a proviso "that this section shall not be so construed as to validate any act of the legislature of Washington Territory granting shore or tide lands to any person, company, or any municipal or private corporation." What effect does that proviso have on any such act? It prevents the constitution from "validating" it. If the act was a valid law, it continued so; if it was invalid, it continued the same. Everybody knows that the proviso was aimed at a single case where the legislature of the territory did once attempt to grant shore lands to a railroad company; and it was merely to prevent that act from gathering force from the constitution, so as to render that valid which it was suspected had become or had always been invalid, that the proviso was enacted. The grant was believed to have been a fraud, and dead in law, and the proviso was to prevent its being galvanized into life. But the act of 1854 (code, § 3271) was not a grant of lands in any sense. This court has said it was "but a license, at most"; and, while I do not agree that the right to wharf out was dependent upon the act, the court's statement is good law, to the effect that it was not a grant of tide or shore lands, and therefore was not covered by the proviso in question. But mark the difference



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when the constitution touches shore lands covered by patents of the United States, taken and paid for in good faith by settlers. Article 17 treats of tide lands, and in its second section the state expressly disclaims all title to such patented lands, unless the United States shall set aside the patents as fraudulent. Now, under the case of *Pollard's Lessee v. Hagan*, 3 How. 229, these patents, so far as the tide lands were concerned, were absolutely void, and the lands would have belonged to the state but for the constitutional waiver made by the people of the state, in their high sense of fairness and justice.

The only other provision on the subject in the constitution is in § 1 of article 17, where the state's ownership of the beds and shores of all the navigable waters in the state to ordinary high water mark is asserted. But it did not require any such assertion to vest those lands in the state; for by an unbroken line of decisions, from far back of *Pollard's Lessee v. Hagan*, the courts have held that this ownership is in the state, thrust upon it as sovereign, in trust for its own people and those of the nation, for purposes of commerce and navigation as natural highways. It is idle to say that this assertion in the constitution conferred or strengthened the actual title of the state, and this could not, therefore, have been its purpose. But there was a valid purpose to subserve by this assertion, and that was to put it beyond question that in this state the sovereignty assumed was to high water mark, and not merely to low water mark. The United States, in all its grants, has conceded that the fast land stops at high water mark; but in some of the states, as Massachusetts, Rhode Island, Illinois, and Minnesota, the title of the shore owner has been conceded to extend to low water, or a certain distance below high water mark. This concession was by legislation in some states, and by the decisions of courts in others. *Meyers v. St. Louis*, 8 Mo. App. 266. I hold that it was to

place Washington in the rank of the greater number of states which stop the title of the shore owner at high water that the constitutional assertion of ownership was made, and for no other purpose, since no other purpose could be subserved by it. But mark, again, the care with which this assertion of ownership was coupled with the proviso, "that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state." Under the view the court takes of these constitutional provisions, what vested right could there be to which the proviso would apply? It could not have reference to any wharf property erected under the act of 1854, since the court says that act was a mere license; and a mere license is revocable at the pleasure of the licensor, and creates no vested rights. *Kivett v. McKeithan*, 90 N. C. 106; *Johnson v. Skillman*, 29 Minn. 95 (43 Am. Rep. 192; 12 N. W. Rep. 149); *St. Louis Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384 (54 Am. Rep. 243); *Cobb v. Fisher*, 121 Mass. 169. So the court holds that the right to future accretions is not a vested right, citing *Taylor v. Underhill*, 40 Cal. 471, although that was merely the refusal of the court to declare a void certificate of purchase from the state a cloud upon plaintiff's right. This leaves nothing whatever for the constitutional provision to act upon, and the language, under the court's interpretation, is mere sound without any substance whatever.

The article (15) on harbors and tide waters is nothing more than a limitation upon the legislature prohibiting it forever from disposing of the sea or river beds beyond certain lines in front of incorporated towns. Such lines exist in all important harbors, and are drawn to preserve the public right of navigation. Usually their location is changed from time to time as circumstances require, and it was a change of this kind, fully authorized by the state, that produced the case of *Yates v. Milwaukee*, 10 Wall. 497. The court seems to construe § 2 of this article as

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though there were never to be any wharves here except "upon certain designated areas," and that construction is quite harmonious with the views taken of the constitutional scheme as a whole; but, if anything else were necessary to convince one that the whole construction is wrong, this would supply it. Certainly no equally absurd scheme could be contrived, unless some one were to propose that until the state builds its wharves, all ships must be anchored at the harbor line—cargo and passengers to get ashore as best they can.

Turning now to the act of March 26, 1890, the first thing that attracts attention, as having a bearing on the matter under discussion, is that, for some reason, the law gives the pre-emptive right to buy tide lands, with certain exceptions, not to the public at large, but to the upland owner; and therein, I maintain, is fashioned the general policy of the state on this subject, which is to enlarge the right conceded to be in upland owners by the act of 1854, and is exactly in harmony with the legislation of every other state in the union which has lands of this character and laws upon the subject. I say this is the policy, because it is not going outside of proper bounds to further say that, of all the shores of navigable waters within the State of Washington, not one ten-thousandth part will be free from this pre-emptive right of shore owners or their grantees, under § 12 of the act. This § 12 has some striking language in it, which, to my mind, further shows the policy. Under it, when an abutting owner has attempted to convey tide lands in front of his uplands, or littoral rights therein, his grantee may purchase the tide lands to the extent of the tract or rights (littoral rights) so conveyed. Now, what are the "littoral rights" which the upland owner could so convey? Are they what the constitution speaks of as "vested" rights? The mere license under the act of 1854 was not one of them, because a license is personal

to the licensee and cannot be conveyed. 13 Amer. & Eng. Enc. Law, 545. What "littoral" right could an upland owner attempt to convey but his right to wharf out by way of severance? I confess inability to imagine any other; and if there is no other, and this one has no existence, then the statute has nothing to act upon. But suppose it was the wharf license that was meant, § 12 says nothing about an executed license as the one to be confirmed; and, if this be the littoral right intended, then the legislature did not look upon the act of 1854 as repealed by the constitution. Furthermore, it is hard to see what good the state's deed to the shore owner's grantee will do for him, whether the littoral right be natural or statutory, if the harbor line area is to be a wall between him and deep water. The state would be driving a hard bargain, indeed, with any such plan of operations, and is not to be suspected of such a scheme. But the most important thing about this § 12 is the legislative admission contained in it that the "land" and the "littoral right" are two so distinct and severable things that they may absolutely belong to different persons by deeds from the state. This is exactly what the doctrine of riparian access and wharfage is, and the justice of the provision made is apparent.

Lastly, touching the proviso of the eleventh section:

"That if valuable improvements, in actual use for commerce, trade or business, have been made upon said tide lands by any person, association or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved: . . . *Provided*, That nothing in this act shall be so construed [as] to apply to any improvements made after the passage of this act."

Here, again, the care of the legislature to preserve the right of the upland owner to acquire these lands is manifested most broadly; for, subsequent to the passage of the act no enlargement of the improvements can be

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made, and the court in its decision so holds. And it is also to be noted that, whereas, the upland owner may acquire all of the tide lands in front of his upland, the improver has the pre-emptive right to nothing but the "land so improved"; so that in this case the appellants' purchase would be limited to the exterior line of their actual works on the 26th day of March, 1890, and the appellee could acquire all in front of them to the harbor line. Now, it was settled in *Weber v. Board of Harbor Commissioners*, that a purchaser of tide lands from the state was entitled to none of the rights of a riparian owner. 18 Wall. 57. Upon what consideration, then, was this pre-emptive right conferred upon "improvers?" The act itself furnishes the answer. By § 12, where the upland owner has by his deed, for a consideration, conveyed his rights away, his grantee will be protected; yet there may be another class who have merit equally as strong as the grantee under a deed. Where the owner of the fee of land has stood by for years, while an adverse claimant under color of title has made valuable improvements, the improvements offset the damages for withholding, *pro tanto* (code, § 541); and, if the inaction of the owner continues beyond the term of our statute of limitations, the very title is presumed to have passed to the adverse party. An easement, however, of the nature of which the upland owner's rights, both by nature and by statute, largely partake, is much more easily lost. It is lost if the holder of the right does, or permits to be done, any act inconsistent with the future enjoyment of the right. 6 Amer. & Eng. Enc. Law, 147. Therefore, if an upland owner has in any case remained passive while another has in good faith placed erections in the waters in front of him, which have not been abandoned, but are in customary use, the equitable policy of § 12 requires that an estoppel be sustained against the denial of the upland owner that he has conveyed to his permissive improver.

The courts, which have often restrained intrusions of this kind, when objected to promptly, would have supported such an estoppel; why, then, should not the legislature recognize it?

But I maintain that the statute did not and could not deprive the upland owner of his full right to move promptly in the courts for the removal of any obstruction to his access to the water, where it was placed there against his will, and under threats of force and violence, as the fact is admitted to be in this case, and that whenever such a state of facts exists any title derived from the state must be held in trust for the upland owner. Such cases are precisely within the principles of *Atherton v. Fowler*, 96 U. S. 513, and numerous other cases, where force, fraud and the misconduct of officers have transferred lands patented by the United States to their rightful owners. Emphasis is laid upon the construction by the last paragraph of the section, where it is provided that nothing in the act shall apply to improvements made after the date of its passage; showing the legislative intention to discourage all scrambling possessions or claims not founded upon the upland owner's deed. Conceding, however, that the act was intended to apply to such a claim as the one at bar, it cannot be regarded in any other light than as showing the intention to make improvements alone the basis for the state's parting with its legal title, leaving the holders of adverse equities to resort to the courts for their enforcement. *United States v. Schurz*, 102 U. S. 378. And here the importance attached to a pleading of the facts in the answer appears. None of the material averments of the complaint were denied; for the allegations therein of the plaintiff's various rights were not material. If by nature the plaintiff had the rights claimed, it was not necessary to plead them, and the statute gave him the exclusive right to purchase. The answer was a confession and avoidance

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in the nature of a plea in bar. But the rules of equity pleading require that a plea in bar shall state the facts upon which the avoidance is claimed, so that the plaintiff may demur to the sufficiency of the facts as constituting a defense. *Goodrich v. Pendleton*, 3 Johns. Ch. 384; *McCloskey v. Barr*, 38 Fed. Rep. 165; *Pumpelly v. Green Bay Co.*, 13 Wall. 175; *Farley v. Kittson*, 120 U. S. 303 (7 Sup. Ct. Rep. 534). This answer alleged that valuable improvements in actual use for commerce, trade and business had been made upon said lands long prior to the 26th day of March, 1890, and that said improvements were, on March 26, 1890, in actual use for commerce, trade and business, and that the defendants were the owners of, and in possession of, such improvements. These allegations are all but legal conclusions. *Poorman v. Mills*, 35 Cal. 118 (95 Am. Dec. 90); *McCloskey v. Barr*, *supra*. The decision says the demurrer admits the truth of these allegations. But a demurrer admits the truth of such facts only as are well pleaded, and not of mere conclusions of law. Of what could these improvements consist that would bring the defendants within the statutes? It is clear that there were no docks, piers, wharves, or other conveniences of shipping, because it is declared, in the sixth paragraph, to be the intention of the defendants to erect and maintain such structures in the future. This court says they may not enlarge their present improvements; and their right to wharf out is precluded by the decision in *Weber v. Board of Harbor Commissioners*, and by the fact that either the upland owner or some one else may buy the area in front of them to the harbor line. I conclude, therefore, that there is nothing in the constitution or the statute which is hostile to the doctrine of riparian access and the right to wharf; that, if it is denied tentatively by § 1, art. 17, the proviso leaves it to the courts to say whether, under the

law, such rights exist; and that upon the pleadings the judgment should have been sustained.

The court has found that upon authority a riparian proprietor on the shore of the sea or its arms has no rights, as against the state or its grantees, to continued access to the water, or to extend wharves in front of his land below high water mark. In the language of Mr. Lewis, in his work on Eminent Domain (p. 83), it has done so "by a narrow and technical course of reasoning, based upon the fact that the title to the soil is in the state or the public;" and has not, as I conceive, accepted the great weight of authority both in England and America. To my mind, in reading its conclusion, it has completely ignored the prime common source of the state's title, and of the riparian claim to access, which is that the navigable waters are natural public highways. Yet, as compared with this matter of substance, all questions of reclamation, of accretion, and reliction, of fishery and sea weed, pale and fade into insignificance. It is as highways that the sovereignties of the world, and particularly our own, have any jurisdiction over the navigable waters, differing in any respect from their jurisdiction over the fast land, and their different jurisdiction is of precisely the same character as the jurisdiction over highways upon the land. Under the constitution of the United States, congress has the power to regulate commerce between the states and with foreign nations; but, while under this power it has never yet undertaken to dictate concerning the manner of construction of any land highway not undertaken by itself, it has gone upon the water highways, both tide and fresh, and assumed the broadest control, deepening channels, changing harbors, building dikes, and regulating the building of bridges, in all of which it has been sustained by the supreme court of the United States, solely because the waters are natural



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highways. But it is at this point that the opponents of the riparian right of access make their strong stand, and where the forces of the parties for and against meet in final conflict; and that the court did not see fit to allude to this phase of the question is greatly to be regretted. For the real question involved here is not whether the owner of upland bordering upon the sea has any adverse claim to the soil under the water, as against the state, but whether, being upon his own fast land, he can step therefrom upon the public highway, and there, as a member of the public, enjoy the public right of passage.

In the case at bar the appellants, possessing themselves of the exact line which borders the land and the highway, say to the land owner: "You can reach the water by yonder street, or, if you will wait until we have built a wharf here, you can pass over it at the same rate of toll as any other person. In the mean time, you cannot pass at all."

The appellants, however, in order to sustain their own position, are forced to maintain the very doctrine they fight against—that of the right of access. They oppose the upland owner's access, but, having planted themselves in the highway, they propose to build wharves and maintain access themselves. By their improvements they propose to turn the shallows into land, and then will claim that access to the water is necessary to its enjoyment. But here is land formed by nature that since time was had no other outlet than over the sea, put there by nature as a highway. The land passed from the sovereign owner by right of discovery, the United States, by solemn patent to the appellee, who is now told that the highway he relied upon is forever closed without his consent and without any compensation for his loss. Has he been damaged? "Actually, oh, yes," will be admitted by his bitterest opponent; "but not in law, because the title to the land beneath this water is in the state." But wherein does the nature

of the state's title to soil under navigable waters differ from that of its title to soil of a land highway? No writer or court that I have been able to consult points out the distinction, if there be one, except the subjection of the state's title in the submerged soil to the constitutional powers of congress. If the purpose to be subserved by the state's holding the two titles are identical then, viz., the perpetuation of highways, it seems extremely difficult to argue on any secure or even plausible ground that the owner of land abutting on the sea has not the same right of access to and continuance of his highway as his neighbor who abuts upon a land highway. Certainly it is not necessary to argue what the rights of an abutter on a road or street are. The state, or its hand-maids, the county, township or municipal corporation, regulate and improve the way, but they cannot destroy it or injure the abutter's direct access to it from every part of his frontage without compensation. A late writer on this subject says:

“‘Once a highway, always a highway,’ is an old maxim of the common law, to which we have often referred, and so far as concerns the rights of abutters, or others occupying a similar position, who have lawfully and in good faith invested money or obtained property interests in the just expectation of the continued existence of the highway, the maxim stills holds good. Not even the legislature can take away such rights without compensation.” Elliott, Roads & S., p. 658.

To illustrate this by more explicit authority: It has long been settled that running a street railroad is a proper public use of a street, when built so as not to interfere unnecessarily with the public right to travel over it; and that the mere erection of such a structure on the surface of the street does not entitle an abutting owner to compensation, even when the fee of the street is in him. But in some large cities it became necessary to have elevated railroads to carry on the traffic. These were authorized by the leg-

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islature of New York, with no provision for compensating abutters; and in a very recent case where an elevated railroad had been built in front of his premises on Pearl street, an abutting owner sued the railroad company for damages. *Abendroth v. Manhattan Ry. Co.*, 122 N. Y. 1 (19 Am. St. Rep. 461; 25 N. E. Rep. 496). The court of appeals in its decision said: "The term 'abutting owner' will be used in this judgment to denote a person having land bounded on the side of a public street, and having no title or estate in its bed or soil, and no interests or private rights in the street, except such as are incident to lots so situated. . . . There is no finding that the plaintiff, or any one of his predecessors, ever had any title to or estate in the land whereupon this street is maintained, or any interest in the street except that of an abutting owner." The court then recalls numerous cases where abutting owners, both in city and country, in England and America, had been allowed special damages for obstructions in highways not opposite their land, and not authorized by legislative enactment, as well as several late cases in that state where the same principle had been upheld, where the obstruction was by legislative authority. Speaking of these last cases it says:

"The judgments for damages which have been recovered and sustained against the elevated railroads do not and cannot rest on the ground that the roads are public nuisances, for they were constructed pursuant to statute; and besides, as before stated, a public nuisance does not create a private cause of action, unless a private right exists and is specially injured by it. The only remaining ground upon which they can and do stand is that, by the common law, the plaintiffs had private rights in the streets before the roads were built or authorized to be built. . . . The constitution of this state provides: 'Nor shall private property be taken for public use without just compensation.' It is settled by *Story v. N. Y. Elevated R. R. Co.*, 90 N. Y. 122 (43 Am. Rep. 146), and *Lahr v. Metropolitan Elevated Ry. Co.*, 104 N. Y. 268, that such rights as the plaintiff has in

Pearl street are private property, within the meaning of the constitutional provisions quoted. . . . It follows that the authority conferred by the legislature to construct the road is not a defense to the action."

As will be seen from the decision, so far as the public generally was concerned, no matter how great was the nuisance in the street, it could remain, because the legislature authorized it.

And while I am so near the subject, I will here refer to the case of *Hoboken v. Railroad Co.*, 124 U. S. 656 (8 Sup. Ct. Rep. 643), relied on by the court to sustain its decision; for the student of that case, it seems to me, must see that the only matter there in issue and decided was whether the State of New Jersey, as the superior of the city of Hoboken, could wholly destroy the public right of passage over filled up lands at the end of a street, beyond the end of the street as originally dedicated. No private citizen was complaining, and the court says, on page 693:

"The right insisted upon in these actions by the city of Hoboken is the public right, and not the right of individual citizens claiming by virtue of conveyances of lots abutting on streets made by Stevens or his successors in the title. The public right represented by the plaintiff is subordinate to the state, and subject to its control. The state may release the obligation to the public; may discharge the land of the burden of the easement, and extinguish the public right to its enjoyment. Whatever it may do in that behalf conclusively binds the local authorities, when, as in the present cases, the rights of action asserted are based exclusively on the public right."

And it might have added that the legislature of New Jersey could have altogether destroyed the corporation of Hoboken, but it could not touch the right of a single lot owner, corporation or no corporation, to pass from his lot to the street, and thence abroad. The difficulty which the court finds in harmonizing *Yates v. Milwaukee* and the other leading cases in the United States supreme court with *Ho-*

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*boken v. Railroad Co.*, vanishes entirely when the right of the state to encumber a public highway, or to destroy it altogether, so far as the public right is concerned, is studied in connection with a case like that of *Abendroth* and the other New York elevated railroad cases, and the same principles are applied to both.

And now, the right to wharf is derived by strict analogy from the abutter's right in connection with a land highway; for no one questions the right of an abutter, where the improved roadway covers but a narrow strip in the middle of the way, to build for himself a convenient means to reach the traveled track over the intervening land; and so, on the waterway, the navigable part of the water is the actual way, to which the wharf is the reasonable means of access. And, as the right of access to the road pertains to every portion of the abutter's front, so the right to wharf belongs to all the riparian owner's front. I know it is said, in response to this, that the abutter cannot charge a toll to any member of the public who goes upon his side-way. Granted; but there is no question here of charging wharfage, which must be always reasonable, and is always under the public control. *Transportation Co. v. Parkersburg*, 107 U. S. 691 (2 Sup. Ct. Rep. 732). It was strongly intimated in *Yates v. Milwaukee* that, whenever the waterway was made navigable up to the line of the upland owner's land, he could then no longer maintain his right to project his wharf. But, except in very contracted waters, the cheaper and more practical way is to build out the wharves, instead of deepening the water. The deprivation of these private rights by the state, for its own public purposes, is the taking of property, whether on land or water, and must be compensated. Why, at this day, are these rights denied? I think this is the reason: Sometimes it happens that it is not necessary, for purposes of navigation, that the waterway should be as wide as

nature has made it. Moreover, the waters have washed down the banks, and made shoals and flats, which can be filled up and made fast land, valuable for building, and even farming, purposes. The self-interest of upland owners has led them, in some instances, backed by their lawful riparian rights, to claim substantially the whole beneficial use of the entire area from the high water mark to the point of navigability, by which means, and the non-assertion of the state's rights, they have filled up the flats, excluded the water, and made land of the whole. In some states, as Rhode Island and Minnesota, this has been conceded to them as a right, and the public has received nothing for its complaisance. This is not justice. The protest against such a monopoly has, as is often the case in such matters, overflowed its proper bounds, and gone to the extent of denying all riparian rights. But there is a middle course, which is the right one in my judgment, and which the courts ought to pursue, as leading to the law of these cases. I regret that the decision here adopted follows one of the extremes, and not the middle course.

I now come to consider the cases cited by the court as requiring its conclusion. Theoretically that is not "land" which is beneath navigable water; from the high water mark all beyond is water. Grants of land stop at the margin, no matter how shallow or extensive may be the shoals beyond. Yet, although we do not endow the state as an ordinary landlord, we say that the title to the sea and river bottoms is in it. The state holds upland upon the same terms and with the same rights as a private citizen. We enforce this rule, even upon the federal government, in all but the matter of taxation and the right of eminent domain. There was a time when it was thought that the land beneath navigable waters belonged to the United States; but the supreme court in *Pollard's Lessee v. Hagan* awarded it to the several states. Yet in that great case (3 How. 229)

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the court said that Alabama held these submerged lands as a part of her sovereignty and jurisdiction, not governed by the common law of England as it prevailed in the colonies before the revolution, but as modified by our own institutions; and that, "although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the constitution of the United States and the laws which shall be made in pursuance thereof." And it is worthy of note that the eminent counsel, who successfully presented that case for the defendant, said:

"A right to the shore between high and low water mark is a sovereign right, not a proprietary one. Rivers do not pass by grant, but as an attribute of sovereignty. The right passes in a peculiar manner; it is held in trust for every individual proprietor in the state or the United States, and requires a trustee of great dignity. Rivers must be kept open; they are not land which may be sold. *Martin v. Waddell*."

I think there is a popular idea that *Pollard's Lessee v. Hagan* in some way involved the question of riparian rights. On the contrary, it was a contest between a patentee of tide flats from the United States, who was not an upland owner, and a squatter on the tide flats, who had no license whatever from the State of Alabama. The same repute is true of *Martin v. Waddell*, 16 Pet. 367. But the case was this: The titles to nearly or quite all the land in New Jersey came from the grantees of the Duke of York, to whom Charles II, in 1664, in consideration of the annual payment of forty beaver skins, gave a charter bestowing upon his royal brother the sovereignty and proprietorship of all the lands, bays, waters, rivers, soils, fisheries, etc., within a vast area. The duke immediately parceled out his domain, under grants equally generous in their terms with that of the king to himself, and under one of these the proprietors of East Jersey became vested with all his rights in the lands and waters

about Raritan Bay. In 1702 the proprietors surrendered to Queen Anne the sovereignty only; and, by the revolution, New Jersey became an independent state. The royal grants, however, were respected, and New Jersey had no public lands. The proprietors continued to make grants of lands to colonists, and in a few instances attempted to convey exclusive rights of fishing to individuals in certain defined areas of Raritan Bay. In 1821 one Arnold, the possessor of such a fishery, sued one Mundy for trespass in entering the limits of his fishery and taking away oysters. The case was appealed on a judgment for defendant, and is reported in *Arnold v. Mundy*, 6 N. J. Law, 1 (10 Am. Dec. 356). The ground of the decision was that, although the king of England could by his royal charter grant to a subject an indisputable title to any or all of the fast land, he could not and did not grant one inch of the soil beneath the waters to the Duke of York, because it belonged to the sovereignty, which was held in trust for the common public, and was returned to Queen Anne, to be devolved in turn upon the State of New Jersey. After stating some of the dispositions which the state might make of these soils, the court said:

“The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right [of fishery]. It would be a grievance which never could be long borne by a free people.”

In 1824 a statute of New Jersey gave to riparian owners the right to drive stakes in the waters of the bay, in front of their lands, to which to fasten nets, they not interfering with the navigation or any fishery. Waddell drove stakes accordingly, within the lines of a several fishery theretofore granted by the proprietors, and Martin, the grantee of the fishery, brought ejectment. The cause resulted as did *Arnold v. Mundy*, and reached the supreme court of



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the United States in 1842, where it was affirmed. The question here was, as in all cases of ejectment, upon the strength of plaintiff's title, and had no bearing whatever upon any riparian rights of the defendant; nor did the fact that the defendant had a license from the state cut any figure in the decision, and the result would have been the same without it. The court said: "From the opinion expressed in *Blundell v. Catterall*, 5 Barn. & Ald. 287, and in *Duke of Somerset v. Fogwell*, 5 Barn. & C. 883, the question whether since *Magna Charta* the king could grant to a subject a portion of the soil covered by the navigable waters of the kingdom so as to give him an immediate and exclusive right of fishery, either of shell fish or floating fish, within the limits of his grant, must be regarded as settled in England against the right of the king." The case of *Willson v. Marsh Co.*, 2 Pet. 245, decided in 1829, merely held that, in the absence of congressional legislation, the state of Delaware could authorize the damming of an inconsiderable, sluggish creek for the purpose of facilitating the owners of its marshy shores in reclaiming them, so that the health of the community could be bettered; and that a citizen of another state could not complain of the obstruction. *McCreedy v. Virginia*, 94 U. S. 391 (1876), decided that a state held the tide waters, and the fish in them, for its own people, and not for the people of another state, and that a statute prohibiting the citizens of any other state from taking the fish was, "in effect, nothing more than a regulation of the use by the people of their common property," and therefore no denial of the constitutional right that the citizens of each state have to all the immunities and privileges of citizens of the several states. *Barney v. Keokuk*, 94 U. S. 324, confirmed the claim of the state of Iowa to the title of the Mississippi to high water mark; but, as the main point in the case, held that one who has dedicated a street parallel to navigable

water cuts himself off from riparian ownership, and yields to the public, in this instance the city of Keokuk, the right to wharf out as an incident of the public use of the street. Barney's contention was that, as owner of the land to the middle of the river, his dedication only extended to the water's edge, and that the filling beyond that line was a trespass on his land.

It will be seen from the opinion of the court here that its decision is based mainly upon these United States supreme court cases. It is worthy of remark that they have not been so interpreted in any but a very small minority of the states; and the supreme court itself has never in a single instance based its ruling in a case, where the riparian right of wharfage was in issue, upon any state statute or ascertained custom or usage. In its most clearly cut decision, *Yates v. Milwaukee*, no such interpretation was allowed to interfere with its declaration of a riparian right of wharfage in *Yates*, although he was contending, not only against the city of Milwaukee, but against the state of Wisconsin, which had chartered the city to regulate the wharves on her water front, and herself to build and maintain such aids to navigation at the ends of streets. In *Weber v. Commissioners*, 18 Wall. 57, notwithstanding the language quoted by the court in its opinion, Judge FIELD distinctly and broadly announced the adherence of the supreme court to the doctrine of *Yates v. Milwaukee*, and showed that *Weber* was not a riparian owner. It is worth remembering, at this point, that San Francisco was the successor of a Mexican pueblo, and that the municipal corporation was the owner of all the land to high water mark; so that when the State of California fixed the harbor line, and surrendered the tide lands within it to the city, it was making the surrender to a riparian owner. *Hart v. Burnett*, 15 Cal. 530.

Inasmuch as the cases above noted are chiefly relied upon

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to overcome the force of *Dutton v. Strong*, *Yates v. Milwaukee*, and *Railroad Co. v. Schurmeir*, and as none of them involved the matter here in issue, I will briefly allude to these three cases, which it is agreed do touch the point. It is urged that there was a difference between the fresh water rules and the salt water rules; or that the upland owner had already built his wharf, presumibly under state license; or that there was some unmentioned statute on which the court was relying, etc. But if any such elements did enter into the consideration of those cases, the published decisions, from syllabus to signatures, including briefs of counsel, fail to note the fact. Their declarations are broad and general, and, if we may rely on anything in judicial decisions, we ought to be able to do so here. Each of the cases was quoted in the succeeding ones, and all have been cited often and again by the supreme court, and by almost every federal and state court. *Yates v. Milwaukee* is the leader, and that was a case in which the state's authority was indirectly, but very materially, in question. So in *Railroad Co. v. Schurmeir*, the defendant had the state's title to the land over which the plaintiff claimed to exercise his right of access. Since those decisions there is, I believe, not a single case in the federal or state reports where the principles therein laid down are doubted or departed from. On the contrary, they have been often cited, always to the effect contended for here, and to the frequent overruling of contrary holdings. It is the same with the law-writers who have embraced this subject in their works, with a single exception. I mention this, not as arguing that numbers make the law, but to show that the profession has not understood those decisions to have been pronounced with any of the qualifications and reservations insinuated here; and I conclude with the proposition, taken from these cases, and never denied by the supreme court of the United States, that a riparian owner on the sea shore has a natural

right of access, and a right to construct a landing, wharf or pier for his own use, or for the use of the public, which is a vested right or appurtenance to his land under the common law of real property as it exists in the United States, without any reference to statutory license or customary usage.

In support of this position I cite Ang. Tide Waters, 24 *et seq.*, 224 *et seq.*; Cooley, Const. Lim. (5th ed.), p. 675, note 1; Ang. Water Courses (7th ed.), 732; 3 Washb. Real Prop. (5th ed.), 445; Gould, Waters, §§ 148–154; Lewis, Em. Dom., §§ 77–83; Dill. Mun. Corp. (4th ed.), § 106; Washb. Easem. (4th ed.), 324; Houck, Rivers, §§ 280, 281; 6 Amer. & Eng. Enc. Law, 558; 28 Myer's Fed. Dec., tit. "Riparian and Littoral Proprietors"; 3 Kent Comm. (13th ed.), p. 413, note; Kerr, Inj., pp. 264, 265. Mr. Wood, in his Law of Nuisances, is, I believe, the only modern text-book writer who maintains the opposite ground. But this author does not attempt to misconstrue *Yates v. Milwaukee*, or find excuses for this ruling. On the contrary, he attacks it boldly, characterizing the language of it as "mere *dictum*," and declares the principle established by it as "wholly unsustained by any authority." We are not accustomed to thus lightly treat decisions of that great court, but the attack thus made is admirable for its audacity. *Lyon v. Fishmongers' Co.*, 17 Moak, Eng. R. 51, is also explained away by this court as never before. Mr. Wood found no explanation. He quotes at length from the opinions of Lords CAIRNS, CHELMSFORD, and SELBORNE, and then says:

"Thus it will be seen that there is considerable conflict upon the question discussed in the note, but, while we believe that the doctrines advanced in this case are utterly fallacious, and unsustained in principle as they are upon authority, it will not be profitable to pursue the matter further; but, as it is the business of an author to give the law as he finds it, I have felt constrained to give the lead-

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ing portions of the opinions of the lords justices in the case, that the question may be fairly presented."

I take it that the author "gives the law as he finds it" when he quotes the opinion of the two highest courts of the civilized world, although he personally does not agree with the correctness of their decision.

The court assumes that inasmuch as many of the states have long had statutes regulating the riparian owner's exercise of his right of wharfage, and in many instances enlarging it, therefore his right rests entirely upon the statute of his state. I do not see why it should be so regarded, since we constantly find what has always been the law enacted into statutory form; and we might as consistently say that the state's title to the tide and shore lands is dependent solely upon article 17 of the constitution. It is sufficient to say that the courts of the states alluded to have not taken any such position, and I shall now cite some cases showing this to be the fact. One of the oldest of these statutes is that of Maryland, in 1745; but in *Railroad Co. v. Chase*, 43 Md. 23, the court said: "These riparian rights [of accretion and wharfage], founded on the common law, are property, and are valuable; and, while they must be enjoyed in due subjection to the rights of the public, they cannot be arbitrarily or capriciously destroyed or impaired. They are rights of which, when once vested, the owner can only be deprived in accordance with the law of the land, and, if necessary that they be taken for public use, upon due compensation;" citing *Yates v. Milwaukee*. In New York, although for many years the courts have been handicapped by *Gould v. Railroad Co.*, as a settled rule of property, in *Mayor, etc., v. Hart*, 95 N. Y. 443, the court said:

"But it shocks every notion of justice and right to say that the riparian owner upon navigable water has no equities by reason of that ownership. It is a doctrine which

is repudiated by the entire legislation of our own state. . . . And whenever and wherever the state has granted to the city of New York exterior lands, under water, it has accompanied the grant with pre-emption rights to the adjacent owners. It is idle to say that all this has been done of pure grace, and without any equity in the abutters. There was reason for doing it, and justice in the act. Granting, as has been held, that the riparian owner has no legal or equitable right enforceable as such against the public right, it is nevertheless true that out of his situation upon the bank, and the convenience and benefit of the water front, he suffers peculiar damage and individual injury when cut off by the public use."

If stronger language was needed to show that the New York court of appeals would now overturn *Gould v. Railroad Co.* if it could, it is to be found in *Rumsey v. Railroad Co.*, 114 N. Y. 423 (21 N. E. Rep. 1066, and 25 N. E. Rep. 1080). Rhode Island has always maintained the doctrine contended for without reference to any statute. *Providence Steam Engine Co. v. Providence, etc., S. S. Co.*, 12 R. I. 348 (34 Am. Rep. 652); *Clark v. Peckham*, 10 R. I. 35. Connecticut in like manner. *Simons v. French*, 25 Conn. 346; *State v. Sargent*, 45 Conn. 358. This case contains an eminently fair discussion of the powers of the state. In New Jersey the courts maintained the rule until *Stevens v. Railroad Co.*, 34 N. J. Law, 532 (3 Am. Rep. 269) (see *Keyport, etc., Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. 516; *Gough v. Bell*, 22 N. J. Law, 441; *Bell v. Gough*, 23 N. J. Law, 624), when in a long discussion, not in any wise necessary to the decision of the case, the court announced that riparian owners had no rights which could be injured by the state, but at the same time sustained a judgment for injuries of precisely the character discussed, in all essential parts. The decision on the main point, for which the case is celebrated, was based on the English case of *Duke of Buccleuch v. Board of Works*, L. R. 5 Exch. 221, which was reversed afterwards in the house of lords (L. R. 5 H. L. 418), and still

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further overthrown by *Lyon v. Fishmongers' Co.*, 17 Moak, Eng. R. 51, on the very point relied on. The legislature of New Jersey immediately amended the wrong done by this decision by its act of 1869. *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21 (100 Am. Dec. 597), says:

“The state can grant authority to make such erections [of structures below high water] either to the riparian owner or to others, so long as the riparian owner is not thereby deprived of access to and the use of the river as a public highway, which is implied, if not expressed, in the grant to him of land bounded on the stream.”

In North Carolina, *Bond v. Wool*, 107 N. C. 139 (12 S. E. Rep. 281), is the latest of several cases on this subject, and there the court said:

“In the absence of any special legislation on the subject, a littoral proprietor and a riparian owner, as is universally conceded, have a qualified property in the water frontage belonging by nature to their land; the chief advantage growing out of the appurtenant estate in the submerged land being the right of access over an extension of their water fronts to navigable water, and the right to construct wharves, piers or landings, subject to such general rules and regulations as the legislature, in the exercise of its powers, may prescribe for the protection of the public rights in rivers or navigable water.”

It will be said that the phrase, “in the absence of any special legislation on the subject,” means, “unless there be special legislation otherwise;” but it is not so. The sense is, “without any legislation to that effect,” and the decision shows it. *Bond v. Wool* is supported by decisions in other states, old and new, in numerous cases, of which I mention one or more in each, viz.: In Michigan: *Rice v. Ruddiman*, 10 Mich. 125; *Lincoln v. Davis*, 53 Mich. 375 (51 Am. Rep. 116; 19 N. W. Rep. 103). In Indiana: *Bainbridge v. Sherlock*, 29 Ind. 364 (95 Am. Dec. 644). In Wisconsin: *Delaplaine v. Railroad Co.*, 42 Wis. 214 (24 Am. Rep. 386). In Minnesota: *Brisbine v. Railroad Co.*, 23

Minn. 114. In Missouri: *Meyers v. St. Louis*, 8 Mo. App. 266, affirmed, 82 Mo. 367. In Illinois: *Railroad Co. v. Stein*, 75 Ill. 41. In Kentucky: *Thurman v. Morrison*, 14 B. Mon. 367. In Ohio: *Hickok v. Hine*, 23 Ohio St. 523 (13 Am. Rep. 255). In Arkansas: *Organ v. Railroad Co.*, 51 Ark. 235 (11 S. W. Rep. 103), and cases cited. In California: *Shirley v. Bishop*, 67 Cal. 543 (8 Pac. Rep. 82). In Oregon: *Wilson v. Welch*, 12 Or. 353 (7 Pac. Rep. 341); *Parker v. Packing Co.*, 17 Or. 510 (21 Pac. Rep. 822).

Of these states, at least Missouri, Kentucky, Arkansas, North Carolina, California and Oregon stop the upland title at high water mark. Cases to the same undoubted effect in the United States courts are: *Bowman v. Wathen*, (Ind.) 2 McLean, 376; *Packet Co. v. Atlee*, (Iowa) 2 Dill. 479; affirmed, 21 Wall. 389; *State v. Railway Co.*, 33 Fed. Rep. 730; *Hollingsworth v. Parish of Tensas*, 17 Fed. Rep. 109, 113; *Rutz v. St. Louis*, (Mo.) 3 McCrary, 261; *Transportation Co. v. Parkersburg*, 107 U. S. 699 (2 Sup. Ct. Rep. 732); *Potomac Steam Boat Co. v. Upper Potomac Steam Boat Co.*, 109 U. S. 672 (3 Sup. Ct. Rep. 445). In *Van Dolsen v. Mayor*, 17 Fed. Rep. 817, decided in 1883, the facts were precisely those of the case at bar, and after considering all of the cases, both English, state and federal, the court holds that the New York elevated railroad cases are decisive of the law in that state, since there is no difference between the principles applying to the landway and the waterway; and, further, that in view of *Yates v. Milwaukee*, *Lyon v. Fishmongers' Co.*, and other like cases, *Gould v. Railroad Co.*, 6 N. Y. 523; *Stevens v. Railroad Co.*, 34 N. J. Law, 532 (3 Am. Rep. 269); *Lansing v. Smith*, 4 Wend. 9 (21 Am. Dec. 89), and *Furman v. Mayor, etc.*, 10 N. Y. 567, are no longer to be regarded as controlling. There the lessee of the riparian owner sought an injunction to prevent the city of New York, which was the owner of the land between high and low water, from filling up the



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flat and obstructing the way, and was held to be entitled to the relief asked.

This court, I think, misreads the case of *Lyon v. Fishmongers' Co.*, when it gives importance to the term "privilege," as though the right sustained in *Lyon* were a concession of statute or usage merely. On the contrary, each of the lords who delivered an opinion was pronouncedly clear that the right was by nature. Said Lord SELBORNE:

"The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because his land has by nature the advantage of being washed by the stream; and, if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the same stream. . . . Even if it could be shown that the riparian rights of the proprietor of land on the bank of a tidal navigable river are not similar to those of a proprietor above the flow of the tide, I should be of the opinion that he had a right to the river frontage belonging by nature to his land, although the only practical advantage of it might consist in the access thereby afforded him to the water, and the right of navigation common to him with the rest of the public. Such a right of access is his only, and is his by virtue and in respect of his riparian property; it is wholly distinct from the public right of navigation."

No other state court has interpreted this case and the opinions of the judges to mean anything but what they say; and a very high English authority, the *Encyclopædia Britannica*, cites the case in the concluding words of its article on riparian laws, in this way:

"It should be noticed that rights of the public may be subject to private rights. Where the river is navigable, although the right of navigation is common to the subject of the realm, it may be connected with a right to exclusive access to riparian land, the invasion of which may form the ground for legal proceedings by the riparian proprietor."

Says Judge Dillon, in his *Municipal Corporations*, § 106 (4th ed.):

“By the common law the riparian owner has the right to establish a wharf on his own soil, this being a lawful use of the land. The right is judicially recognized in this country, and riparian owners on ocean, lake or navigable river have, in virtue of their proprietorship, and without special legislative authority, the right to erect wharves, quays, piers and landing places on the shore, if these conform to the regulations of the state for the protection of the public, and do not become a nuisance by obstructing the paramount right of navigation. This right has been exercised by the owners of the adjacent land from the first settlement of the country.”

The idea of “purpresture” furnishes forth a great difficulty in the mind of the court. There is a short and comprehensive history of that portentous institution in *People v. Davidson*, 30 Cal. 379, from which it appears to be not much more than an ancient prerogative ghost, whose original substance has been completely emasculated by the later law. Suffice it to say that whether the doctrine of purpresture, as applied to wharves extended by riparian owners, has any force in this country or not, it never, in its palmyest days, had the effect of permitting the king to shut off the riparian owner of land from access to the sea by an obstruction of any kind placed in the highway, which is the real ultimate point in issue in this case.

In conclusion, I recur to the act of 1854, to remark that if that act is to be taken as now repealed, and if riparian owners have not the natural right of access and wharfage, then there is not, in the State of Washington, any authority under which the slightest convenience can be erected or maintained in aid of navigation, excepting in front of incorporated towns; and all the accumulations of labor and wealth, already expended by private enterprise in building up a commerce second to none in present importance and

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future promise, are laid at the mercy of a public policy which has not seen its equal since men began to "go down in ships." For what? To maintain an idea of "legal title" and royal sovereignty, which has been repudiated for generations, and which now at this day says to the common people of Washington: "The shores of your great inland sea, and of your hundred rivers, are walled in by the state until such time as, after survey, appraisement, contests, slow legislative proceedings and what not, the speculator on your necessities shall have loaded himself with tide land patents, and fattened with your fees for crossing his 'land.'" The simple logger may not roll the hard won product of his toil down the slope of his land and into the water, because some shrewd watcher of the land office has bought the shore while his back was turned. This is making the waters a public highway with a vengeance. But the illustration is just, because it refers to the very use made every day of our shores in hundreds of places without wharves, docks or piers, and where there is no question of purpresture, but only the right of access is availed of. It involves the principle of the case in homely, practical form. Conceiving that no such conclusions were necessarily involved in the constitution or the statute, I dissent from the idea that any such policy was intended to be adopted, even though it were lawful to do so.

[No. 147. Decided March 12, 1891.]

## WARREN WHITCHER v. THE STATE OF WASHINGTON.

## RAPE — ASSAULT WITH INTENT — INFORMATION — VARIANCE.

Under the statute of this state (§ 1004, Code 1881) an information which omits the name of the defendant from the charging part, but names him in the accusing part of the information, is sufficient. (ANDERS, C. J., and STILES, J., dissent.)

To warrant a conviction under an information charging an assault with force, with intent to rape a female under the age of sixteen years, an assault with force must be proved; and an instruction, that the fact that she consented to the advances made constitutes no defense, is erroneous. (DUNBAR, J., dissents.)

Though the laws of Washington make it rape to have carnal knowledge of a female under the age of consent, even with her consent, there can, in the absence of fraud, be no assault with intent to rape, when she consents, since there can be no assault without force or fraud.

*Appeal from Superior Court, Lincoln County.*

The facts are fully stated in the opinion.

*N. T. Caton*, and *D. J. Crowley*, for appellant.

The court manifestly erred in instructing the jury that if the prosecuting witness was under the age of sixteen years, she was incapable of giving consent to the act of sexual intercourse, and that any attempt to carnally know her would be criminal. The age of consent is twelve years. Code 1881, § 812; Laws 1885-6, p. 841; *Harland v. Territory*, 3 Wash. T. 131; *Tingue v. Village of Port Chester*, 101 N. Y. 294 (4 N. E. Rep. 625); *People v. Hills*, 35 N. Y. 449; *People v. Briggs*, 50 N. Y. 553; *Leonard v. January*, 56 Cal. 3; *People v. Gadway*, 61 Mich. 285 (28 N. W. Rep. 101); *Rumsey v. Territory*, 3 Wash. T. 331. Even if it were true that the age of consent was sixteen years, the court erred. The information charges an attempt to ravish and carnally know Annie Estabrook by force and against her will. The statute enu-

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merates two different classes of facts, each of which constitutes rape. The prosecutor cannot charge a rape of the one class, and sustain the charge by proof of a rape of the other class. Nor can he charge an assault with intent to commit a rape of the one class, and sustain the charge by evidence of an intent to commit a rape of the other class. The variance between the allegations and the proofs would be fatal. *Greer v. State*, 50 Ind. 267 (19 Am. Rep. 709); *Turley v. State*, 3 Humph. 323; *Hooker v. State*, 4 Ohio, 348; *State v. Noble*, 15 Me. 476; *Dick v. State*, 30 Miss. 631. Under the statutes of Washington, there is no such offense as assault with intent to commit rape upon a child under the age of consent, who as a matter of fact does consent; for an assault upon a female, old or young, consenting, is a legal impossibility. *Smith v. State*, 12 Ohio St. 466 (80 Am. Dec. 355); *O'Meara v. State*, 17 Ohio St. 518.

Geo. A. Allen, Prosecuting Attorney, and J. W. Merritt, for the State.

The opinion of the court was delivered by

HOYT, J. — Plaintiff in error seeks by this appeal to reverse the judgment and sentence of the superior court of Lincoln county, whereby he was convicted of the crime of assault with intent to commit rape, and sentenced therefor. As a first reason for said reversal, plaintiff in error contends that the information does not state facts sufficient to constitute a crime. The information is as follows: "Warren Whitcher is accused by the prosecuting attorney of Lincoln county, State of Washington, by this information, of the crime of an assault with intent to commit rape, committed as follows, to wit: On the 16th day of June, 1890, in the county of Lincoln, in the State of Washington, in and upon one Annie Estabrook, a female of the age of twelve years and more, an assault did make, and

her, the said Annie Estabrook, then and there did beat, bruise, wound, and ill treat, with intent her, the said Annie Estabrook, by force and against her will, feloniously to ravish and carnally know, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the laws of the State of Washington," — and is, we think, sufficient. It is true, as contended by the appellant, that the name of the defendant is omitted in the charging part of the information, and, were it not aided by our statute, it would be bad. But thus aided it is good, as a man of common understanding could see therefrom that the acts charged were clearly intended to be so charged as the acts of the person named in the accusing part of the information.

The court instructed the jury that, if the person upon whom the attempt was made was under the age of sixteen years, the fact that she consented to the advances made would constitute no defense. This was error. The information charged an assault with force, and to warrant a conviction thereunder an assault with force must be proved. To prove an attempt without force when the charge was of one with force would be a clear variance. Besides, we do not think there can be such a thing as an assault to commit rape where consent is given. It is true that our statute has provided that having carnal knowledge of a female child under age shall be rape. Yet such statute has in no manner changed the definition of "assault." And we are unable to conceive of a person being assaulted who consents to the acts which, without such consent, would constitute an assault. Fraud in obtaining such consent may operate to make the person perpetrating the fraud liable. But, if so, it is upon the theory that the fraud used is equivalent to force. The legislature could provide that any undue familiarity with the person of a female under age should constitute an assault with intent

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to ravish, but it has not done so. And as the law now stands there can be no felonious assault without the facts necessary to constitute a simple assault being elements thereof; and as we think there can be no simple assault without force, and with consent, it follows that there can be no such thing as an assault with intent to commit rape where, without fraud being practiced, consent is given to all the acts relied upon to establish the crime. Other errors were assigned upon the record, but a decision thereof would not aid the lower court upon a new trial, and we shall not therefore discuss them. The judgment and sentence must be reversed, and the cause remanded for a new trial, and it will be so ordered.

SCOTT, J. — I concur in the result; also in holding the information good, and that it was necessary to prove a forcible attempt, force being alleged.

ANDERS, C. J. (*concurring*). — While I concur in the conclusion that the judgment of the court below should be reversed, I am unable to assent to the proposition that the information in this case states facts sufficient to constitute a crime. Section 1006 of the code provides that the indictment (information) must be direct and certain as regards the crime charged, the party charged, and the particular circumstances of the crime charged, when they are necessary to constitute a complete crime. It is true that it is stated in the introductory part of the information that the defendant is accused of the crime of an assault with intent to commit rape, but it is nowhere alleged in the information that he did any of the acts constituting the crime of which he is "accused," and which are set forth in the charging part or body of the information. The introductory part of an information, which sets forth the name of the crime, is nothing more than a formal statement of a

conclusion of law supposed to result from a certain state of facts, and is useless unless fully warranted by the facts pleaded. A conclusion of guilt may be drawn from the particular facts and circumstances alleged; but in this case the fact that the defendant did those things alleged in the information can only be inferred from the accusation itself. I am of the opinion that the court erred in overruling the demurrer to the information.

STILES, J., concurs.

DUNBAR, J. (*dissenting*).—I dissent; I think with Judges HOYT and SCOTT that the information is sufficient. While its construction is awkward, I have no doubt that a person of common understanding could tell from reading it what was intended; that is the object of an indictment or information, and all that is necessary; anything more than that is simply verbiage, and its omission ought not to defeat the ends of justice. But I do not agree with the majority that the court erred in instructing the jury that if the person upon whom the attempt was made was under the age of sixteen years, the fact that she consented to the advances would constitute no defense. I agree with the proposition that there cannot be such a thing as an assault to commit a rape where consent is given; but I think within the meaning of the law no consent *can* be given where the female is under the age of sixteen years. It is the mental consent that the law contemplates, not the physical consent, and the theory of the law is that a female under the age of sixteen years is not of a consenting mind, and therefore cannot consent; or, in other words, the law will not allow her to consent. The judgment should be affirmed.



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Argument of Counsel.

[No. 110. Decided March 13, 1891.]

## JOHN EDWARDS v. THE STATE OF WASHINGTON.

HOMICIDE—CHANGE OF VENUE—WITNESS—ACCOMPLICE—  
CORROBORATION.

Under § 1073, Code 1881, vesting the matter of a change of venue in a criminal case entirely in the discretion of the trial court, the supreme court will not reverse a conviction, unless the discretion has been most clearly abused.

It is not error, under § 1092, Code 1881, to allow one indicted with the prisoner, but not put upon trial with him, to be used as a witness for the state prior to his discharge.

The evidence of an accomplice, uncorroborated in material matters, is insufficient to authorize a verdict of guilty, except in those cases where, from all the circumstances, the honest judgment is satisfied of guilt beyond a reasonable doubt. Under the facts in this case, it is held that the testimony of the accomplice in the murder is untrustworthy, and the facts claimed to be in corroboration of his story are wholly immaterial. (SCOTT, J., dissents.)

*Appeal from Superior Court, Pacific County.*

The facts are fully stated in the opinion.

*Caples, Hurley & Allen, Kannaga, Holcomb & Elwood, and F. D. Winton, for appellant.*

The refusal of the court to grant a change of venue was such an abuse of discretion that the supreme court ought to review the same. *State v. Nash*, 7 Iowa, 347; *Simmerman v. State*, 16 Neb. 615; *State v. Billings*, 77 Iowa, 417.

Courts as a general rule will set aside a verdict rendered upon the unsupported testimony of an accomplice. Whart. Crim. Ev. (8th ed.), 441, note 3; *Ray v. State*, 1 G. Greene, 316 (48 Am. Dec. 379); *People v. Evans*, 40 N. Y. 1; 1 Bish. Crim. Proc. (3d. ed.), 1169; *People v. Eckert*, 16 Cal. 111; *People v. Ames*, 39 Cal. 403; *Middleton v. State*, 52 Ga. 527; *State v. Moran*, 34 Iowa, 453; *People v. Thompson*, 50 Cal. 481; *Dill v. State*, 1 Tex. App. 287; *People v.*

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*Elliott*, 106 N. Y. 288; *Buchanan v. State*, 24 Tex. App. 195; *Welden v. State*, 10 Tex. App. 400; *Gillian v. State*, 3 Tex. App. 133; *Hoyle v. State*, 4 Tex. App. 239; *Jones v. State*, 4 Tex. App. 437; *Simms v. State*, 8 Tex. App. 230; *Roach v. State*, 4 Tex. App. 478. Corroborating testimony must be such that, standing alone, it in some manner tends to connect the defendant with the commission of the crime. 1 Bish. Crim. Proc., 1173; *State v. Odell*, 8 Or. 30; *People v. Thompson*, 50 Cal. 480; *McCalla v. State*, 66 Ga. 346; *Oraft v. Commonwealth*, 80 Ky. 349; *People v. Ames*, 39 Cal. 403; *Miller v. Territory*, 3 Wash. T. 554; *State v. Hunsaker*, 16 Or. 497; *State v. Cody*, 18 Or. 506; *Pitts v. State*, 43 Miss. 472; *People v. Lewis*, 36 Cal. 531; *State v. Chyo Chiagk*, 92 Mo. 395; 2 Russ. Crimes (7th ed.), 963.

George J. Moody, Prosecuting Attorney, *Fulton Brothers*, and A. G. Hardesty, for the State.

Granting or refusing a change of venue is a matter within the discretion of the trial court. *Findley v. State*, 5 Blackf. 576; *Sumner v. State*, 5 Blackf. 579 (36 Am. Dec. 561); *Reynolds v. United States*, 98 U. S. 165; *Ward v. Moorey*, 1 Wash. T. 104.

The fact that no difficulty occurred in selecting a jury shows that there was not just foundation for the application, and that there was no abuse of the discretion vested in the court. *Watson v. Whitney*, 23 Cal. 378; *State v. Reno*, 41 Kan. 674 (21 Pac. Rep. 806); *State v. Gray*, 19 Nev. 412 (8 Pac. Rep. 456); *State v. Millain*, 3 Nev. 433; *People v. Plummer*, 9 Cal. 299; *People v. Mahoney*, 18 Cal. 180; *Wright v. Commonwealth*, 33 Gratt. 880; *Hunter v. State*, 43 Ga. 483.

The appellate court will not interfere with the action of the trial court in refusing a change of venue on account of the prejudice of the inhabitants of the county, unless it appears there was a palpable abuse of discretion, and that injustice has been done. *State v. Guy*, 69 Mo. 430; *State*

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*v. Burgess*, 78 Mo. 235. Where the application for the change is met by counter-affidavits of citizens from various localities in the county, showing non-existence of prejudice, the denial of the application is not reversible error. *Price v. People*, 23 N. E. Rep. 639; *State v. Cadwell*, 44 N. W. Rep. 711; *State v. Kennedy*, 77 Iowa, 208; *State v. Perigo*, 70 Iowa, 657; *People v. Goldenson*, 76 Cal. 328.

There is no statute in this state requiring corroboration of an accomplice's testimony, and at common law no corroboration was required. Roscoe, Crim. Ev., 132; Whart. Crim. Ev., 441. The evidence, if standing alone, is not to be rejected, and whether corroborated or not (and to what degree it needs corroboration the jury must judge), may be sufficient to satisfy the minds of the jury. *State v. Stebbins*, 29 Conn. 463 (79 Am. Dec. 223); *People v. Costello*, 1 Denio, 83; *State v. Holland*, 83 N. C. 624 (35 Am. Rep. 587); *Com. v. Price*, 10 Gray, 472 (71 Am. Dec. 668, note p. 671); *People v. Gallagher*, 75 Mich. 512; *People v. Jenness*, 5 Mich. 305; *Wisdom v. People*, 11 Colo. 170 (17 Pac. Rep. 519); *People v. Kunz*, 73 Cal. 313; *People v. Schweitzer*, 23 Mich. 301; *Foster v. People*, 18 Mich. 271; *Fisher v. People*, 20 Mich. 135; *Halilton v. People*, 29 Mich. 188; *Black v. State*, 59 Wis. 471; *Olive v. State*, 11 Neb. 1; *Ingalls v. State*, 48 Wis. 647.

The opinion of the court was delivered by

STILES, J. — The appellant was indicted jointly with John B. Rose, George F. Rose and James E. Gibbons for the murder of Sina Frederickson, near South Bend, in Pacific county, on Thursday, January 30, 1890, and was tried separately. Before the trial a motion to change the place of trial to another county, on the ground of prejudice on the part of the community against the accused, supported by numerous affidavits, showing the circulation of some intemperate newspaper articles among the people of the county, and considerable hostile feeling in the neighbor-

hood where the alleged crime was committed, was made and denied. But, inasmuch as the statute (code, § 1073) seems to vest the matter of a change of venue in a criminal case entirely in the discretion of the trial court, we should not feel warranted in reversing a conviction, unless the discretion had been most clearly abused. Here, however, but twenty-six jurors were examined, and there is no complaint of any misconduct on the part of the jury selected. It seems to be probable that, while it was true that the persons qualified to act as jurors who lived in the vicinity of South Bend would have been very few by reason of the excitement they were under, still there was a large portion of the county, from which the jury was actually drawn, where the excitement did not exist.

The prosecution in this case relied entirely upon the testimony of George Rose. Without his statement there were some circumstances which might have pointed to the accused as the person, or one of the persons, who had committed the homicide; but, under the theory of the state upon the trial, these circumstances were entirely laid aside, and became of no value. George Rose was the first witness called for the prosecution, and the defense at once objected to his being allowed to testify, on the ground that, being jointly indicted with the prisoner on trial, he could not be a witness until he had been discharged. The court overruled the objection, and permitted him to testify, which appellant urges as error. But under the liberal system we have, which permits almost every person to testify in any cause, whether civil or criminal, we think it was not error to allow one indicted with the prisoner, but not put upon trial with him, to be used as a witness. The language of § 1092 of the code is: "When two or more persons are included in one prosecution, the court may, at any time before the defendant has gone into his defense, direct any defendant to be discharged, that he may be a witness for the territory;" and it will thus

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be seen that we interpret the word "prosecution" to mean "trial." It can work no substantial injury to the accused whether the witness has been discharged or not. While still under indictment, the witness cannot be used as such, unless by his consent, and by his willingness, and his voluntary act of testifying; which he should never be allowed to do unless it is clearly necessary for the case of the state. He earns the equitable right to a discharge, which will always follow where he has been straightforward and honest with the court; whereas, on the other hand, if he has been discharged, and then in his testimony plays false with the court, the order of discharge will be set aside, and he will be put upon trial, even on his own confession. Therefore the temptation to press hard upon the accused in giving his testimony is equal in either case, and his credibility, not his competency, must be the point of attack.

The deceased, Sina Frederickson, was undoubtedly the victim of a most brutal murder, somewhere near the time alleged (January 30, 1890), and it is almost equally certain that at nearly the same time, and by the same hand or hands, her husband, Jens Frederickson, met a like violent death. Both were probably instantly killed—she by a rifle bullet, he by a load of small shot and percussion caps; both being shot through the head. Their bodies were found about a mile apart—hers being buried under the refuse of a hog-pen upon the premises of John B. Rose, near the shore of Shoalwater Bay, about four miles below South Bend, and on the opposite side of Willapa river; and his being laid in a trail made by cattle, close to some large logs, further to the west, and within a few rods of high water mark on the bay. The grave in which Mrs. Frederickson was buried had been excavated to a depth of two or three feet; but her husband lay in the hollow made by the cattle in jumping over the logs where the ground was swampy, and was covered by very little earth and some coarse sods, just

enough to hide him. His body was discovered accidentally by searchers, while hers was pointed out by George Rose, when all the efforts of the searchers to find it had failed. These two unfortunate young people, only a month before their death, had taken up their residence upon certain government land adjoining the land of John B. Rose, and were living in a boat-house floated upon some logs at high water mark. The land had been previously several times occupied by different claimants, who had abandoned it, and Frederickson intended to prosecute a contest in the land office to clear the record of former filings. The Rose place consisted of something over a hundred acres, and had upon it a farm house and outbuildings, an orchard, etc. It had been settled for many years, and was used by Rose as a place to keep cattle and poultry, and for the raising of supplies for his hotel in South Bend, where he lived. No other person lived in the vicinity of this land, and the country around was wild, rough and uncultivated. The only means of travel to it seems to have been the waters of the bay and river. Edwards, the appellant, was a young man, employed by Rose to attend to the cattle and other property at the ranch, and lived there alone; but it had been for some time arranged that he should quit his employment, and a man named Prickett, with a family, had been engaged by Rose to take his place. Edwards left this ranch on Sunday, February 2d; and in all probability, had it not been for the revelations of George Rose, he would have been more than suspected of this double crime, although the body of the woman might never have been found. But, as will appear in the aspect in which the case was presented at the trial, this presence of Edwards so close to the scene of the crime, and so near the time when the Fredericksons were missed, cut no figure at all as a circumstance tending to prove his guilt.

George Rose was the first witness for the state, and the

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only witness, excepting those who were called to corroborate him by showing the language and actions of Edwards after he was suspected of participation in the crime. After stating that he was eighteen years old, and that he knew the Fredericksons, he was asked to tell the story of the killing of the Fredericksons in his own way, which he did in these words:

“Well, on the 29th day of January father came to me in the evening and says to me he wanted me to go down to the place the next day with him to look after some cattle. And Ed. Gibbons stood about ten or twelve feet from him, and he said he would like to go down with us. So the next morning we went down, about half past 6 o'clock in the morning—left South Bend. And all three went down to the place, and when we got down there we saw Edwards was there; and we went in the house, and father and Gibbons and Edwards was standing there talking awhile in front of the house, by the gate. Father says to Edwards: ‘You better go up and get Frederickson to help bring the cattle down;’ so father and Edwards went off after Frederickson, to bring the cattle down, and brought him down, and went down after the cattle. And we walked along the bluff, and there was a hawk set up on a tree, and Gibbons says to me, ‘Give me your gun, and I will see if I can kill that hawk;’ and I let him have the gun, and after he shot the hawk he kept the gun, thinking he might see some geese to shoot at; and we walked down until we got down by the cow trail, and Gibbons walked ahead, father next, and I was behind father, and Frederickson behind. And I heard Gibbons say to Frederickson, ‘Look here, Frederickson,’ and just then he shot; and I turned around and said, ‘That’s a pretty way to use a man after calling him to help drive the cattle up;’ and Gibbons says, ‘That’s the kind of cattle we came down after.’ I told him if I had known that I would not have come down with them. So after Gibbons shot Frederickson, Edwards walked into the brush and got a spade out and began to look around for a place to bury him; and it was in the cow trail; and father says, ‘That’s good enough place right here;’ and Edwards went to work and dug the grave, and I went off ten or

fifteen feet from where they was, and sat down on a log, and never looked up at them until after they had the grave ready, and called me to help lay him in the grave. They had his gum boots pulled off and gum coat, and laid them down where he was dropped; and I helped put him in the grave, and throwed over what loose dirt there was, and then they pulled some grass sod up and put it on top of him; and after that father picked up his gum coat and boots and throwed them down in the slough as we walked along about a hundred yards from where he was buried; and we walked up to the house, and as we got along the beach father said, 'Better hurry up and get Mrs. Frederickson down; she may suspect something—go away; so they went up and got Mrs. Frederickson, and when we were going by the house Edwards said to me, 'Give me your shotgun.' I told him I would not let him have it, and father commenced cursing and swearing at me because I would not let him have it; and Edwards said, 'I will go and get the rifle; don't make any fuss about it;' and they was gone up after Mrs. Frederickson about twenty minutes; and I heard some one scream, and I went out and looked, and saw her coming along the fence; father had hold of one arm, and Edwards had hold of the other; dragging her through the mud-hole; and after they got through the mud-hole Edwards walked ahead and father walked behind, and just as they got inside the gate Edwards picked up the rifle and walked up about ten feet from the gate, and Mrs. Frederickson got inside, and asked what they had done with her husband. Edwards says, 'We shot him;' and she says, 'Then kill me; I don't want to live any longer;' and Edwards raised the rifle and shot her, and they buried her right there behind the pig-pen, and Edwards dug the grave; and after the grave was dug father called me to help put her in the grave; and I came up to help put her in the grave; and we covered her up, and threw some sods on top of her, so they would not see the loose dirt; and father and Edwards came back to Frederickson's house, and locked the door; and when they came down Edwards carried the shotgun, and Gibbons carried the revolver; and father called me out to the front of the house by the gate, and he had \$50, and gave it to me, and



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he said if he ever found out that I told this on him I would be dead first; and, furthermore, if I went down to the place next week, and it came up stormy, and anybody asked what became of Fredericksons, to say that I saw them go out the day of the storm; and before we left that evening Gibbons gave me the revolver. I told him that I did not want it, but he gave it to me, and I kept it until the next ——. We, father, Gibbons and I, left the place about 5 o'clock that afternoon, and got up to South Bend about half past seven, and had supper by ourselves, my sister Frances preparing it. Edwards stayed at the house. He was to take the boat (Frederickson's) and put it out and sink it that night in the river; swamp it."

Asked what any of them stated as the reason for killing these people, he said, "Well, father wanted to get that 160 acres of land there, is the reason he killed them;" and that, in December previous, Edwards had cleared a spot on the Frederickson land to build a house on, and told Rose he would take the place for him.

We have given this statement in full, in the words of the witness, for the reason that, taken with the other facts in the case, it is one of the most remarkable cases in the history of criminal law. Here is a boy of eighteen, who accuses his father, a man past seventy years of age, of planning and executing this horrible crime, and of carrying his son into it, as a witness of a double murder, for the pitiful motive of clearing the way to the possible acquisition of a parcel of almost worthless land, at the same time that neither the father, Edwards nor Gibbons provides himself with any weapon whatever when going on their expedition of murder, but depends entirely upon the chance shotgun in the hands of the boy. George, on cross-examination, admitted having had in his possession a pistol belonging to Frederickson; that it had had a leather handle; that he had cut the leather off, and also Frederickson's initials from the wood beneath the leather; that he kept it under his bed, where his mother found it; and that, in response to his

father's question where he got it, he had answered that he bought it of a man at South Bend. He also stated that he had been to the ranch with one Conley on Saturday, February 1st, to assist Edwards in killing a beef; and that on Saturday afternoon, having got "pretty full of liquor," he went down to the ranch in his boat to take Edwards' place until Prickett should arrive, and remained there alone Sunday and Monday. It further appeared that George, shortly after his return from the ranch on Monday, had mentioned in the hearing of various people, that he had seen the Fredericksons go out on the bay in their boat and disappear in a sudden squall. This set the people of South Bend to searching for the bodies, with the result of finding Frederickson in the latter part of February. Suspicion was immediately directed towards George Rose, and he was arrested and charged with the crime of murder. Then began, on his part, a series of statements and confessions, which continued until March 31st, each being different from all the others. At various times he admitted having done both the murders himself on Sunday, February 2d, his excuse being that he had been very drunk, and the circumstances that he had procured Frederickson to go out with him to relieve some cattle that were mired, when, being behind him, he had said, "Look here, Frederickson," and when the latter turned around he had shot him down; that he had gone to the Frederickson house and told Mrs. Frederickson that her husband had hurt himself, so that he could not get away from the Rose house, whereupon she accompanied him to the ranch and was there shot by him with a rifle left in the house for killing cattle; and that he had returned to the Frederickson house, got the pistol and some money there on a shelf, and locked the house, after which he buried the bodies. Again, he charged Edwards with the whole crime, alleging that he had found it out by seeing the fresh earth near the hog-pen and digging down

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until he came to the body of Mrs. Frederickson, and that when Edwards became aware that he knew it, the former charged him to tell the drowning story. Still again, he said that some otherwise unknown person named Andrew Johnson persuaded him to help kill the Fredericksons, and that they did it at Frederickson's house, carrying the bodies away the next day, February 3d. On the 29th of March the Edwards statement was reduced to writing and signed by George Rose, and witnessed by the sheriff and his deputy. On the 30th of March the Johnson statement was likewise signed and witnessed; and on the same day, but later, he made another written statement, in the main corresponding to his testimony in chief at the trial, which was witnessed by the attorneys for the prosecution, the sheriff and another. On the 31st day of March he again took the crime upon himself, in conversation with appellant's counsel, saying that he had implicated the others because the officers would not listen to him when he said he did it alone, but insisted that he had others with him in the murder. At the preliminary examination on April 3d, he confirmed his last written statement and seems to have rested with that until about one week before the trial when, the sheriff having for some reason taken him upon the Rose ranch, he, in the presence of the sheriff and his deputy, reiterated the story that he had himself killed the Fredericksons, and illustrated how it was done. To the making of all these statements the witness excused himself by claiming that, in the *first* place, his attorney (who was not the attorney of any of the other defendants) had told him that if he told different stories the state would not be able to catch him on any of them, and thus he would get off; *secondly*, that the defendant's counsel had told him, after he had made his written statements, that if he would take all the trouble upon himself, that would clear the others, and then they would turn about and help him to get off.

The prosecution maintained that the second written statement of March 30 was a true one, and, for the purpose of showing wherein it differs from George Rose's testimony, we shall here include a part of it, as follows:

"My name is George Rose. My age is nineteen years. My father's name is John B. Rose. My father wanted this 160 acres of land that Jens Frederickson took. He wanted Edwards or Gibbons to take it, and pay out on it, and then deed it to my father. They, Gibbons (who is one of the meanest men ever came into the country) and Edwards and my father all made it up as to how they would kill Frederickson and his wife. After Edwards made up his mind to take the place for father, he cut down some trees on the place, but father found out after Frederickson had built a shake shanty on the claim, that Frederickson had commenced a contest to get the land. On Wednesday or Thursday of the last week in January, father, Gibbons and I took a dingey, and crossed the bay to father's ranch, where we found John Edwards. We had it all made up as to how we were to do the killing."

Now, in his testimony George repudiates all knowledge on his part of the purpose of the party up to the instant when Frederickson was shot, whereas in the statement he shows full participation in the scheme before they left South Bend; the bearing of which is, that under the statement he was not only an accessory before the fact, but an active *particeps criminis*, whereas, according to his testimony, he was the innocent victim of association, who protested to the extent of refusing his gun at the assassination of the woman, and afterward merely endeavored to shield his father, which he had a right to do under the statute. His testimony was, therefore, in the presence of his statement, all the more carefully to be scrutinized, as, if believed as he gave it, it exonerated himself from all responsibility for these two crimes, at the expense of his father and the other two men.

On Sunday, February 2, Edwards went, by way of As-

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toria, to Portland, where he remained a few days and then returned to South Bend and the vicinity of Shoalwater Bay. Suspicion had been roused against him in connection with the Fredericksons, and he became aware of it. But he did not go away, and on the 17th of March he was at Willapa City, a small village. He was drinking, and there were several men in and about the saloons that he visited who sought to get him to commit himself in some way by trying to lead him to talk of the Fredericksons, and by listening to his maudlin talk as he sat dozing in drunken stupor over a stove. He evidently knew when awake what they were driving at, and sought to avoid them. But out of it all he seems to have said to one person, "I'm in trouble; I'm watched, and I want to get out of this country;" and when told he mustn't mind such things, he answered, "You would if you were in my place." Another questioned him about the Frederickson land, whereupon Edwards said: "I suppose you have heard about those people being drowned there? Yes, they were drowned, because I was there two days after they were drowned. Oh, that poor woman!" the last expression, as he leaned sorrowfully toward the witness. A third heard him say, as he sat nodding by the stove: "I might kill a man, but I couldn't kill a woman." The same witness described him as staggering drunk. A fourth witness heard him say: "That's all right, Frederickson; that's all right." In the hearing of a fifth he said: "Why, damn it, I didn't kill the woman; I couldn't do such a thing." All this was occurring from 3 o'clock in the afternoon until 3 o'clock the next morning; but nothing more definite than this came out of it. At another time a witness testified he had been talking to Gibbons and John B. Rose in the jail, and both were protesting their innocence; "and the defendant (Edwards) there was sitting with his back toward me. He didn't look at me, but says he: 'I am innocent of this mur-

der, but I would like to tell who the guilty parties are.’” The witness interpreted this as an expression of a desire on the prisoner’s part to make some statement, and so told the sheriff, who at once saw Edwards and asked him if he wished to say anything. He said he did not, and denied having used the expression attributed to him. Although George Rose did not testify to anything of the sort, the court allowed the prosecution to show that, within a few rods of where Frederickson’s body was found, some time in March, persons had noticed a rectangular hole at the shore end of a little slough. It was about the size of an ordinary grave, and the tide flowed in and out of it from the slough. Its sides looked as though they had been dug with a spade. But George Rose did say that Edwards had got a spade out of the brush near there, within a few minutes after Frederickson was shot. Therefore the argument was that this hole was a corroboration of the spade part of George’s testimony, as well as that this was really a grave dug for the reception of a corpse by Edwards. The same witness, moreover, stated that John Rose, when spoken to about the hole, said that a cow mired there and had been dug out.

We have now stated the substance of all the prosecution’s testimony in the case, and it would seem that it was all that it was possible to produce, as extraordinary efforts were made by the authorities and citizens to secure the conviction of the parties guilty of the Frederickson murders. During a part at least of the five months from the time of his arrest to the trial of Edwards, George Rose was the willing assistant on the prosecution, able, certainly, and presumably ready, to point out every circumstance which would tend to corroborate his statement. Able counsel were employed to assist the state’s prosecutor, both in developing testimony and in trying the case. But to our minds the case went to the jury upon the testimony of

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George Rose absolutely uncorroborated in any particular whatever; for the drunken whinings of Edwards in the Willapa saloons, even though they contained within them anything more damaging than the maudlin protests of one believing himself surrounded by suspicious enemies, were not corroboration of anything testified to by George Rose, nor did they show any admission or knowledge of any fact connected with the crime charged. The court below apparently thought differently, for a motion to direct an acquittal at the close of the state's case, on the ground that there was no corroboration of George Rose, was denied, although the court in its charge to the jury ruled strongly that, to convict one charged with crime upon the testimony of an accomplice, the accomplice must be corroborated in some material matter tending to show the accused to have been implicated in the commission of the crime. Still, it may be that the court meant to leave it to the jury to say whether George Rose was or was not an accomplice at all; as, if full credit were given to his statement, we have shown that he was guilty only of concealing a crime of which he was a witness, but in which he did not participate. This state of things must appear remarkable to any one looking at this case dispassionately. John B. Rose was a man seventy years old, who had resided in and near South Bend many years. He kept a hotel at which some forty people were regular boarders, and was well known to everybody about there. Edwards we have somewhat described. Gibbons was a young man who had, within three weeks only, come to the neighborhood a stranger, boarded at the Rose house, and was engaged with several others in slashing timber near the town. Yet not a single witness was called by the state to show that these men had been seen talking together at any time, or leaving in a boat upon the river, or returning from the river, or taking a supper alone, or in any way consorting together as men having some com-

mon purpose of so serious a character as murder in view; something of which, if there had been anything as described by George Rose, must have been developed in the excitement which followed upon the discovery of the foul murder of these two young people.

Upon this appeal the state seems to concede that George Rose was an accomplice; but it maintains that, in the first place, there was some corroboration; and that, secondly, no corroboration was necessary in law, but that the uncorroborated testimony of an accomplice in this state goes to the jury like the testimony of any other witness, and that the court is bound by the verdict equally as though the witness were in no way complicated with the body of the crime. We have shown how we regard the matters which are claimed to be corroboration; that they are wholly immaterial. As to the other point, it is true that we have no statute requiring the corroboration of an accomplice, such as is found in a few of the states. It is also true that at common law conviction upon the unsupported testimony of an accomplice was upheld to the extent, at least, that, although the higher courts and law-writers laid it down that a trial court ought to advise the jury not to convict on such testimony, it was not reversible, even if they did not so advise. Yet the books are full of cases from courts not bound by any statute, both in England and America, where corroboration has been held necessary. 1 Amer. & Eng. Enc. Law, tit. "Accessory," § 18, p. 74. Cases are rare, indeed, where, if the prosecutor has the assistance of a willing accomplice, no corroborative testimony can be produced. In practice it is almost invariably attempted, and juries are told, as in this case, that unless there is corroboration they should acquit. Perhaps the true view of the matter is that in many, if not in most cases, the evidence of an accomplice, uncorroborated in material matters, will not satisfy the honest judgment beyond a reasonable doubt, and that



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it is clearly insufficient to authorize a verdict of guilty. But there may occur other cases where, from all the circumstances, the honest judgment will be as thoroughly satisfied from the evidence of the accomplice of the guilt of the defendant as it is possible it could be satisfied from human testimony; and in such cases justice demands that the evidence be accepted, so far as the court is concerned. *Collins v. People*, 98 Ill. 584 (38 Am. Rep. 105). The testimony of George Rose was not of the latter class, and the court below did right to charge the jury not to convict without corroboration. Here was a boy of eighteen or nineteen years, who was precocious enough to get "full of liquor;" who never went anywhere without a gun; who, upon his admission made, saw these persons killed; who had the money of Frederickson and his pistol; who slept soundly for two nights alone in the ranch house within a few feet of where Mrs. Frederickson lay buried in filth; who spread the news of the drowning of the Fredericksons; who told his stories without number, and equally varied; who stood by with unmoved calmness when strong men sickened in their labor of removing the dead woman from her horrible grave, and would himself have assisted but that the sheriff prevented him; who never suffered a tremor when he encountered his father after implicating him in so desperate a toil; and who, in the course of a trial lasting a week, was apparently the coolest person in the court-room, admitting frequent falsehoods, but sticking hard to his ghastly story. To say that such a witness should not be distrusted would be to mock at justice, and fling men's lives to the wind. John Edwards may be guilty of participation in this murder, but it is beyond human credibility that George Rose's story should be taken as true in any material particular, unless it be against himself, while it is unsupported by some credible testimony.

We shall not allude at any length to the defense, which

was entirely devoted to proving an *alibi* for George Rose, John B. Rose, and Gibbons. Edwards was, confessedly, at the Rose ranch on Thursday, January 30th. But a dozen or more persons testified that John B. Rose was sick with "la grippe" from Sunday the 26th to Friday the 31st, and that he was confined to his room all day of the 30th; that George was at home Thursday and Friday, doing chores about the house and in the village; and that Gibbons was at his work slashing all the week. Many of the witnesses were clear as to the date, fixing it with reference to the closing of the village school, which occurred Friday afternoon, with an exhibition which George attended, and which he helped arrange for the day and evening before. The teacher, a young lady from Oregon, boarded at the Rose house, and to her the state accorded worthiness of belief. The others were less positive; but the jury evidently disbelieved them all, and gave full credence to George Rose. The verdict was guilty, and the sentence death. For the verdict we see no way to account, except upon the theory that the jury totally misconstrued the value of the testimony offered in corroboration, which they might well do, in view of the court's refusal to direct an acquittal; or there was such prejudice and passion created in their minds that they were incapable of rendering a verdict according to the evidence. There were many assignments of error which we have not touched upon, but we are so thoroughly satisfied that the appellant should have a new trial, on the ground referred to, that it is not necessary to consider them. The judgment is reversed, and a new trial granted.

ANDERS, C. J., and DUNBAR, J., concur.

SCOTT, J. (*dissenting*). — I dissent. I do not think this is a case that should be reversed upon the question of fact. The record discloses no error. There was some corroborating evidence to support the testimony of George Rose, and

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it, with his testimony, was all before the jury for due consideration. Simply because reading the testimony now might not convince one of the guilt of the defendant, will not warrant a reversal. The jury had the advantage of seeing the witnesses upon the stand, and hearing them testify, and the jury's judgment of the facts is the safest to follow. It is going too far to say that there was no sufficient proof of guilt upon which a conviction can be based. I think the evidence for the prosecution shown by the record will bear a more favorable statement than is given in the majority opinion; but, as the case is to be retried, it is perhaps best to refrain from any extended *contra* argument upon the proofs. However, the fact, if it is a fact, that none of George Rose's statements wherein he charged the accused with the crime were entirely true, does not afford ground for reversing the case. He was a man of hardened and abandoned character, and, it seems, at no time repentant, but his conduct does not show that he was especially desirous of shielding himself, although at times such a desire may have operated upon his mind, and in this regard a plausible reason is given for his contradictory statements. That he implicated the others for the reason he is said thereafter to have given, that the officers would not believe him when he said he committed it alone, and insisted that he had assistance, is very unreasonable. At the trial he was kept upon the stand a long time, and was subjected to a rigid and lengthy cross-examination. His testimony in the main was consistent, and there is much that can be said in favor of the truthfulness of his statement as finally given; but quite likely he was actuated at the last moment, when confronted with the solemnity of a trial of that kind, with a desire to shield himself and his father as much as possible, by showing no previous knowledge of his own, and imputing the actual killing to Edwards and Gibbons. The *alibi* the defense undertook to

establish was not conclusive; most of the testimony relating thereto might have been true, as it probably was, and yet sufficient time left for the commission of the murders on the morning of January 30th, as alleged. These murders, if committed as claimed, were no doubt under previous consideration for some time by some of the parties. John B. Rose's sickness might easily have been feigned. The corroborating testimony may all have been subject to some explanation compatible with innocence, but the jury had all of this before them, the judge was a competent and careful one, the defendant was assisted by able attorneys, and he apparently had a fair trial, and I do not think the verdict and judgment should be disturbed. Human tribunals are faulty at best, and it is impossible in a case like this to approach absolute certainty, but every protection is thrown around the accused under our system of criminal jurisprudence, and the liability to err against him upon the question of fact, while possible, is very remote. Only in extreme cases should the appellate court interfere to set aside a conviction upon that ground, and this is not such a case.

[No. 109. Decided March 14, 1891.]

# JOHN B. ROSE v. THE STATE OF WASHINGTON.

## HOMICIDE—COMPETENCY OF JURORS—TESTIMONY OF ACCOMPLICE —CORROBORATION—EVIDENCE.

One called as a juror in a trial for murder who states that he has read accounts of the affair in the current newspapers, that he has talked with others in regard to it and heard them express opinions, that he has formed but not expressed an opinion of his own, and that his former impressions would have no influence upon him as a juror, is competent.

One called as a juror in a criminal case who states that he has formed an opinion as to the guilt or innocence of the accused which

2	310
8	15
26*	264
35*	418
2	310
122	58
2	310
26	212
2	310
36	446
2	310
37	413

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Mar. 1891.]      Opinion of the Court — STILES, J.

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it would take strong evidence to remove, but that he could lay aside his previous impressions and be governed by the evidence given at the trial and the law as charged by the court, is incompetent. (SCOTT, J., dissents.)

It is held in this case that the testimony of the accomplice charging the defendant with murder is untrustworthy and uncorroborated in any material fact, and therefore insufficient to support a conviction. (SCOTT, J., dissents.)

On a trial for murder, it is error to admit evidence that the defendant had stated, at the close of the preliminary examination, that his son had confessed to him the commission of the murder, as the accused was not on trial charged with knowingly concealing a murder committed by another. (SCOTT, J., dissents.)

*Appeal from Superior Court, Pacific County.*

The facts will be found fully stated in this opinion, together with the opinion in the case of *Edwards v. State*, ante, p. 291.

*Caples, Hurley & Allen, Kannaga, Holcomb & Elwood, and F. D. Winton*, for appellant.

*George J. Moody*, Prosecuting Attorney, *Fulton Brothers*, and *A. G. Hardesty*, for The State.

The opinion of the court was delivered by

STILES, J. — The separate trial of John B. Rose for the murder of Sina Frederickson occurred in the week following that of John Edwards, and with the same result. The testimony of George Rose was produced as before, and other witnesses were called to corroborate him. The same line of proof was followed, viz., that of showing expressions dropped by the accused, which, it was claimed, established a guilty knowledge on his part of the crime, and a participation in it.

Marion Bullard was called as a juror, and upon examination stated that he had read such accounts of the Frederickson affair as were published in the current newspapers; that he had talked with other persons in regard to it, and

heard them express opinions; that he had formed, but had not expressed, an impression or opinion of his own; but he further stated that his former impression would have no influence upon him as a juror, and would not cause him to construe the evidence upon the side to which his impression had previously leaned. A challenge for cause was denied, but we think the ruling was correct. Joseph Kaiser was another juror. He was a laborer on the farm of James Albright—one of the jurors on the trial of Edwards; talked with Albright and thirty or forty others about the case; read the newspapers, including accounts of the testimony before the coroner's jury, and at the preliminary examination; had to a certain extent formed an opinion as to the guilt or innocence of John B. Rose, which had not been changed; it was a confirmed opinion, which it would require evidence to remove; if sworn as a juror it would require strong evidence to remove his opinion as to the guilt or innocence of the defendant; he would be governed by the evidence as given at the trial, and the law as charged by the court; could lay aside all his previous impressions, but still had an opinion, though not a decided opinion. Defendant's challenge for cause was denied. This was error. The liberality of courts in the matter of accepting jurors who have read and heard of what purports to be the facts in a criminal case is very much greater than formerly, but they have not yet reached a point where one who states that he has an opinion which it would take evidence or strong evidence to remove can be taken as a juror in a criminal case where the life of a prisoner is in jeopardy. By the court's ruling the defense was compelled to peremptorily challenge the juror to avoid the danger of his presence with a fixed opinion in his mind. There must have existed in the opinion of the court, notwithstanding his assertion to the contrary, a doubt whether or not he could be fair, which should have been resolved in favor of the prisoner.

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Mar. 1891.]Opinion of the Court — STILES, J.

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The testimony of George Rose was in every material respect the same as in the Edwards case, *ante*, p. 291, excepting that upon his cross-examination he made it clear that when, as alleged, the party, consisting of his father, Gibbons, Edwards, Frederickson and himself, left the Rose house to go down after the cattle, no member of the party carried or had mentioned in his hearing any gun or weapon of any kind; that he was the last to leave the yard with his shotgun, which was then unloaded; that without any suggestion from the others he carried the gun, and loaded it as he went; and that nothing was said about the gun until Gibbons took it to shoot the hawk. He also particularly described how he spent his time on Sunday and Monday, February 2d and 3d, when he was alone at the ranch, feeding the cattle, preparing his meals, and quietly reading a book. The name of the book he could not at first give, but finally said it was "Tennis." Counsel suggested "Tennyson," and he agreed that that was the name of it; but beyond that there were stories in "prose," which he afterwards changed to "poetry," he could not say what anything he read was about. He further said that Monday, February 3d, was a very stormy day.

In this case the corroboration was, if anything, weaker than in the Edwards case. John Anderson was active in raising a public subscription of money to employ a detective and a lawyer to investigate the disappearance of the Fredericksons, and went to Rose's house in South Bend to ask him to contribute. Rose was indignant; said he was being blamed for it, and would give nothing. He related what George had said about the Fredericksons going out and being lost on the bay, and appealed to George, who was present, to say if it was not true; and gave as a reason why the bodies did not float that other persons had been drowned there and never been found; his theory being that crabs or seals ate them. Many other people whom the witness met

had the same believe as to the drowning, and a number refused to subscribe to the fund. The sheriff arrested George Rose in the presence of his father, at South Bend, and described the old man as being very much agitated by it. He was allowed by the sheriff to have an interview with George in the presence of one Sweet and Elwood, an attorney; and afterwards, when the sheriff was taking his prisoner to the boat for Bay Center, John Rose stepped up to his son and said to him: "Now, George, don't you talk to any one until you come up before the court, and then you tell the truth. You tell the court about seeing Fredericksons go out on that stormy day in the boat, and about a storm coming up, and you thought they were drowned." He asked permission to send a man along in the boat to protect George from mob violence, and, being invited himself to go, replied that he dared not, as threats were being made against his own life by persons who said they would mob him if he went outside of South Bend. Gibbons was sent by Rose to do what he could for George. The defendant Rose left home on Sunday, February 2d, and went to Oysterville to attend a session of the county commissioners, and on his return from there visited a newspaper office at South Bend, and told the persons he met there in their conversation that his son George last week, at his place near South Bend, had wounded a wild goose, and by tying a string to its leg had caused it to attract others, so that he was enabled to kill thirteen geese. One witness said he added: "I didn't know but what people would think it strange there was so much shooting going on up there, and I thought I would tell you what it is, so if there is anything said about it you would know." Another witness said his remark was: "You needn't mention any names in the paper," witness supposing it was given to him as an item. Another remembered his saying he thought it was a pretty smart trick, but he did not want



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Mar. 1891.]Opinion of the Court—STILES, J.

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anything said about it. Defendant maintained that he said this incident occurred "last fall" instead of last week, as the witnesses gave it. George Rose stated that in fact it did occur in November, 1889, and other witnesses showed that shooting on the flats at the mouth of the Willapa and on the bay was very common.

The testimony in regard to the finding of the alleged grave was repeated. One Prickett, who took the place of Edwards at the ranch, was called to relate a conversation between himself and Rose in regard to a rubber boot leg, the materiality of which was that Frederickson and everybody else down there uniformly wore rubber boots, Mrs. Frederickson having a pair of them on when she was found; and George Rose had reported finding a boot along the shore, which he had again thrown away. Rose asked Prickett to look up this boot, as well as all the other boots about there, and keep them for any search party that came along. Prickett found a boot top in the yard on the Rose place, and a number of other rubber boots in the same vicinity, and when he reported the finding of the boot top to Rose, the latter said: "Was the top cut off that boot?" Witness told him it was, when he asked further: "Didn't you or your boy cut it off?" Prickett answered, "No." Then Rose said: "You or your boy must have cut it off." This boot leg was produced at the trial, and three small spots were pointed out on it as being blood spots. The ingenuity of counsel may have shown this testimony to have been material, but unless it was Frederickson's boot, which nowhere appears, and unless the spots were human blood, which was not attempted to be shown, there seems to have been nothing connected with it of any importance. Many old boots were scattered around there, and cattle were killed near by every day. The witness who testified to this, although in Rose's employ, was in fact employed by the authorities to watch him, talk with him, and report

anything that might escape him. At first the witness said Rose's last remark was: "You must say you cut it off;" but on cross-examination he admitted that he was considerably excited, and that it might be as given above.

At the close of the preliminary examination before a magistrate, according to one of the witnesses, who was among the guard employed by the sheriff, the defendant said he knew George had committed the murder, as he had confessed it to him; that he had got on a drunk and killed them. The state, using Rose's testimony in the Edwards trial as evidence in chief, had already put in a contradiction by Rose of this alleged conversation. Counsel for the defense strenuously objected to the admission of this testimony, and we think it was error to admit it. The accused was there to meet the charge that he was guilty of the murder by being present and assisting in it; not the charge of knowingly concealing a murder committed by some other person. Taking the testimony of the witness as true, the offense of the father in covering his son's crime was only a misdemeanor under the statute.

The defense rested mainly upon the *alibi*, as in the Edwards case; but there were some features of both cases which we shall notice here. Witnesses outside of the family of the Roses, and who were not shown to have had any connection with them, testified that they knew John B. Rose to have been confined to his room with illness from Sunday, March 26th, to Friday, the 31st; that George Rose was hauling wood on Thursday, the 30th, in the forenoon, from back of the hotel in South Bend to the hotel, and in the afternoon, among other things, went on an errand to the stores, to get ham for a dancing party to be given the school mistress on Friday evening; that in the evening of the same day, from after supper time until late, Frances, the school mistress, George and another young man were in the kitchen making cakes for the party; that on Fri-

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Opinion of the Court—STILES, J.

day Rose and his wife, during the day, went into the village, and executed and acknowledged a deed of real estate; that Friday forenoon George was engaged clearing out of a new building the *debris* left by carpenters, to prepare the floor for dancing; that in the afternoon he attended the school exhibition, with many others; that the dancing party occurred at the Rose house on Friday night; that on Saturday George went in a boat with another man down to the ranch, and they, with Edwards, killed a beef, and dressed it, and remained there over night, returning to South Bend early Sunday morning; that on Sunday, Rose, Edwards and the school mistress took the boat and went to Oysterville and beyond, Rose and Edwards being absent several days; that during the day George was about the saloons and was drinking; that in the afternoon about 4 or 5 o'clock he bought a pint bottle of whisky, took it and his gun, and left in his boat for the ranch; and that he did not appear again until Tuesday, when he paid for the whisky with a \$10 gold piece. Two witnesses testified to having seen George on Sunday night, in a wash-room in the rear of his father's house; that they spoke to him and that he then told them he had seen the Fredericksons go out in their boat, but that they disappeared in a squall, and he supposed they were lost. He said he must go to the ranch early in the morning on business. Frances Rose denied having at any time got supper for her father, Gibbons and George, or any of them, as stated by George.

In response to the testimony of the defense, above epitomized, George gave a flat denial wherever Thursday was included, and also denied having bought the bottle of whisky, and his having been seen on Sunday night. On the day after George made his last written statement, which implicated his father, Gibbons and Edwards, counsel for the defense, having heard that he had made such a statement,

went to the jail to have an interview with him, and there George said to him, referring to the murder:

“I done it myself, and I will just tell you how it was. The school ma’am left here Sunday, the 2d day of February. I was feeling a little blue, and I got full that day. I stayed around town till almost dark. Kept drinking all day. About dark I got a quart bottle of whisky, and started for the farm. Going down to the farm I made up my mind to kill Frederickson. I went to bed that night, and got up in the morning with my head feeling pretty bad. I remember that I had made up my mind to kill Frederickson, and then thought I would not do it. I drank all of the quart bottle of whisky that I had brought down with me during the first two hours after I got up, and then made up my mind that I would kill Frederickson. I was drunk, or I would not have done it. I took the shotgun, and put two cartridges into it, and three more into my pocket, which was all the cartridges I had for the shotgun. I then went to Frederickson’s house and told Frederickson that a calf had got its leg between two logs, and that I could not get the logs apart alone, and that I wished he would go with me, and help get the calf out. He went with me. I was ahead, and he followed after me along the trail. When I got over the log where Frederickson’s body was found, I turned around, and Frederickson was just getting onto the log. I said, ‘Look here, Frederickson.’ I had the gun all ready, and, as he looked up, I fired. The charge struck him just below the eye. He dropped down dead. I looked at him a minute and thought that was a pretty tough way to do business. I started for home, and I thought I had better do some more shooting, to make people think that I was out hunting; so I shot away the rest of the cartridges I had with me. This was before dinner. I waited around the house an hour or two. I then thought I would have to kill Mrs. Frederickson, because she had seen Frederickson go away from the house with me, and when he didn’t come back, there would be trouble. I had no more cartridges for the shotgun, so I took the rifle and put a cartridge into it, and several more in my pocket, and went down to Frederickson’s house, and

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Mar. 1891.]Opinion of the Court — STILES, J.

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told Mrs. Frederickson he had broken his leg, and that I could not get him home; that he wanted her to come right up to the house. She put on her rubber boots and started along with me. When we got up near our hog-pen she seemed to think something was wrong, and she said she would not go any further until I told her what I had done with her husband. I told her I had killed him. She said if I had killed her husband I might as well kill her, too; so I took the rifle, and held it close to her temple. She never moved a muscle. I fired, and she fell dead. I then took the gun back to the house, and waited until almost dark. I made up my mind it was a bad job, and that there had got to be something done; so I went and buried Mrs. Frederickson under the manure pile at the hog-pen. I went into the house, and stayed there all night. Next morning I went out to where Frederickson's body was, and buried it just where it laid. I then went to South Bend and told the folks that I had seen the Fredericksons leave in a dingey. That shortly after they left there came up a terrible squall, and after the squall was over I could see nothing more of the dingey, and I thought the dingey had got swamped, and they were drowned. After I had killed Frederickson I took what money he had out of his pocket. There was \$59.50. It was out of that money I bought several chances in the sealskin raffle. Father asked me where I got so much money, and I told him that the South Bend Land Company owed me for work that I had done for them the fall before, and that they had paid me."

And being asked why he had made the statement implicating the others, he said that he had told the authorities the story repeated above, but that they said if he persisted in telling that story they would have nothing more to do with him; that they knew that the other parties arrested were implicated in the murder with him; and that if he told the truth and implicated the others they would do all they could.

In this case, as was before remarked, the corroborative testimony was even weaker than in the Edwards case. The father may have been agitated over his son's arrest for

so heinous a crime. It would be strange if he were not. He may have refused contributions; he may have thought his son smart as a goose hunter; he may have received the confession of his son's guilt; he might have cautioned him to say nothing, or tell the story he had told before, even knowing it to be false; he might send some one friendly to be near in case of mob violence; but how, to the unbiased mind, do any of these things tend to show that George Rose's most remarkable story was true in its material part, wherein it charged his father with participation in this murder? We are unable to see that it should even create a suspicion. The motive assigned, viz., the desire to obtain the Frederickson land, amounted to this: The land was almost worthless for any purpose in itself, and it had lain for years, with occasional claimants who abandoned it. Rose had himself told one or more parties of its condition, and offered to show it to them if they wished to take it up; but he had made no move towards acquiring it himself, until, as his son charged, he found it necessary to employ assassins to destroy a threatened claim upon it. The duty of this court in the premises is too clear for doubt. The appellant must have a new trial, and it is so ordered.

ANDERS, C. J., and DUNBAR, J., concur.

SCOTT, J. (*dissenting*). — I dissent. All the reasons given for dissenting in the Edwards case, *ante*, p. 291, are applicable here. The record discloses no error in law, and the basis for a reversal can only be upon the insufficiency of the evidence. The juror, Joseph Kaiser, spoken of, said he could give the defendant a fair and impartial trial upon the evidence, and the defendant's peremptory challenges were not nearly all exhausted. No point was raised by appellant as to the proof of his statement, made at the preliminary examination, that he knew George committed the

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Mar. 1891.] Opinion of the Court — DUNBAR, J.

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murders, and it was admissible in any event as tending to show the guilt of the accused. Nor do I agree to the statement that the corroborating evidence was weaker than in the Edwards case. The testimony given upon the part of the defense, as stated in the majority opinion, is largely susceptible of explanation, and the corroborating testimony is not fully shown.

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[No. 124. Decided March 13, 1891.]

E. P. CADWELL v. W. H. BRACKETT.

CONTRACT — EVIDENCE.

In an action by plaintiff to recover for services in superintending the construction of defendant's buildings, where plaintiff makes no definite statement of the manner of his employment by defendant, and the evidence shows that plaintiff was under contract with defendant's architects at a stipulated price per day to superintend the construction of certain buildings, including those of defendant, and that defendant was to make up to the architects any deficiency that might exist in plaintiff's wages after the architects had appropriated therefor a certain per cent. they were to receive on the other buildings, a judgment for plaintiff is unwarranted.

*Appeal from Superior Court, Kittitas County.*

The facts sufficiently appear in the opinion.

*Frederick Bausman, and Galusha Parsons, for appellant.*

*Welsh & Warner, and Reavis & Mires, for appellee.*

The opinion of the court was delivered by

DUNBAR, J.—From a careful investigation of the evidence in this case, we are unable to arrive at the conclusion reached by the lower court. It is true that Brackett testified that he was employed by Cadwell to superintend his

building, but makes no definite statement as to the manner of his employment, while he admits he came to Ellensburg under contract with Proctor & Dennis at a stipulated price of six dollars per day. Cadwell, on the other hand, who, for all the record shows, is entitled to as much credit as Brackett, and whose interest is the same, testifies positively that he never employed him at all; that all the contract or understanding he ever had concerning his work was with Proctor, and that the agreement with him was that he (Cadwell) would make up to Proctor & Dennis any deficiency that might exist to bring Brackett's wages to six dollars per day after they had appropriated a certain per cent. that they were to receive on other buildings; and that, in consideration of such deficiency being made up to them, Brackett was to superintend the construction of his (Cadwell's) buildings, in common with the other buildings which Proctor & Dennis were under contract to superintend in Ellensburg. This statement of Cadwell's is explicitly corroborated by Proctor, who, in his direct testimony, says:

"The defendant was to pay the deficiency that might accrue from the proceeds of our work on the other part of it. You [meaning defendant] were to make that up, so that we would not lose anything by bringing Brackett up here at six dollars per day."

He also testifies that when he put Brackett to work on their buildings, under their contract with him, the defendant's buildings were included in the lot; nor can we see anything in the cross-examination of the witness that substantially affects his direct testimony. The testimony of the witness Lloyd might seem to support the theory of the plaintiff. His testimony, admitted by the court as rebutting testimony, was as follows:

"There was one interview between Cadwell, Proctor and myself, in which Mr. Proctor desired to make some arrangement for a superintendent. He stated he could



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Mar. 1891.]      Opinion of the Court — DUNBAR, J.

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not furnish a superintendent, as his contract did not contemplate a superintendent; and in discussing the matter something was said with reference to compensation, and Mr. Proctor said that, generally, the services of such a man was worth \$10 or \$12 a day, but he thought in this case the better way was to prorate the expenses among the different buildings, and he intimated that he thought about two per cent. would be about the compensation on the sort of the building."

Conceding that this testimony is literally true, it does not appear that Cadwell responded in any way, or that the "intimation" resulted in a contract, and in no way disputes the testimony that Cadwell and Proctor afterwards agreed on the terms which they both swear to. Tending to weaken plaintiff's claim is the testimony of his successor in the work, Mr. Paul, who swears that when Brackett quit work he told witness that Cadwell owed him \$40 or \$50, and said that he would not pay him, and that he was going to sue him if he did not pay it. Counsel for appellee in his brief says that the testimony of Mr. Paul is indefinite, but it seems to us about as definite as any testimony in the case. We do not see any force in the argument of appellee that the exhibits and testimony show that Cadwell treated and recognized Brackett as superintendent; for Cadwell does not deny that Brackett superintended his work, but claims that he did not employ him, and that he was to pay Proctor & Dennis for his services, not at the rate of two per cent. on the value of the buildings, but according to the contract testified to by him. The superintendent's duties would be the same under either theory of employment, and Cadwell would have a right to give him the same recognition and authority under one theory as he would under the other. It appears from the testimony that another arrangement was afterwards made between Brackett and Proctor & Dennis in regard to Brackett's compensation, but it does not satisfactorily appear that this new arrangement was ever

Opinion of the Court—ANDERS, C. J.

[2 Wash.]

brought to the knowledge of Cadwell, but, on the contrary, it does appear that when it came to his knowledge that Brackett was intending to hold him responsible for his services, he immediately discharged him. From the whole testimony, it seems to us that Brackett has already received more than he was entitled to under his contract, and that he ought not to recover anything against the defendant in this action. With this view of the testimony, it is not necessary to investigate the law questions involved. The judgment of the lower court is reversed, and the case remanded, with instructions to the court to enter judgment for the defendant for costs.

ANDERS, C. J., and HOYT, STILES, and SCOTT, JJ., concur.

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8	494
26*	554
28*	35
36*	442

[No. 132. Decided March 13, 1891.]

JAMES S. PIERCE *et al.* v. JOSEPH R. KENNEDY *et al.*

## LITTORAL PROPRIETOR—TIDE LANDS—EJECTMENT.

The littoral proprietor of land bordering on tide waters cannot maintain an action in the nature of ejectment against persons who take possession of, erect buildings on and occupy the shore between high and low water mark, opposite his premises, when such part of the shore is within one mile of the corporate limits of a city, and the littoral proprietor has acquired no right to such tide land by lease from the state

*Appeal from Superior Court, Pierce County.*

*Calkins & Shackelford*, for appellants.

*Ballard & Norris*, for appellees.

The opinion of the court was delivered by

ANDERS, C. J.—The facts in this case are substantially the same as those presented in the case of *Eisenbach v.*

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Mar. 1891.] Opinion of the Court — ANDERS, C. J.

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*Hatfield, ante*, p. 236, and by agreement of counsel the two cases were argued and submitted together; and, for the reasons given in the opinion filed in that case, the judgment of the court below should be reversed. But there is an additional reason why appellees cannot prevail in this action. They alleged in their complaint, substantially, that they were the owners of certain lots in the city of Tacoma, bordering upon the waters of Puget Sound; that appellants, at a certain time mentioned in the complaint, willfully, maliciously and unlawfully, and without their consent, took possession of the same, erected buildings thereon, and occupy the same; that they demanded possession of said premises from appellants, who refused, and still refuse to deliver the same to plaintiffs, to their damage in the sum of \$1,000; and praying for possession of the said premises, and for \$500 as attorney's fees, to be taxed as costs, and for further relief. Appellants, defendants below, filed an answer denying the allegations of the complaint, and setting up, as an affirmative defense to the action, that they were occupying the shore between high and low water mark opposite part of the premises described, and that the part of the said shore so occupied by them is within one mile of the corporate limits of the city of Tacoma, and that the title to said shore between high and low water mark is vested in the State of Washington, and by the constitution of said state is reserved from sale, and that the state has power and right to dispose of the possession of said land, and that the plaintiffs have acquired no right to the possession thereof, by lease or otherwise, from the state. Plaintiffs interposed a general demurrer to this answer, which was sustained by the court, and judgment rendered thereon for plaintiffs, from which judgment defendants appeal. We are of the opinion that, upon the pleadings in this case, judgment should have been rendered for defendants. The remedy, if any, of plaintiff-

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On Petition for Rehearing.

[2 Wash.]

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iffs, was in equity, and not by an action in the nature of ejectment. The judgment of the court below must be reversed, and the cause remanded, with instructions to dismiss the action; and it is so ordered. Costs to appellants.

HOYT, DUNBAR, and SCOTT, JJ., concur.

STILES, J.—I concur in the result in this case for the special reasons stated in the foregoing opinion.

ON PETITION FOR REHEARING.

ANDERS, C. J.—On the trial of this cause in this court, the argument of counsel was directed solely to the question of the littoral rights of owners of land bordering upon the shores of an arm of the sea in which the tide ebbs and flows, and our decision was based upon the supposition that the buildings and improvements of appellants complained of were below high water mark. We find no argument or authority presented in the petition for rehearing sufficient to induce us to change our opinion upon that question, and therefore decline to grant a rehearing.

But, after a further examination of the pleadings, we are inclined to believe that the order directing a dismissal of the action should not have been made. Counsel for appellees state, in their petition, that appellees had no intention of bringing any suit or action except for the land above high tide and owned by them, and we think the complaint may fairly be construed to support the assertion. Certain issues of fact seem to be raised by the complaint and answer which appellees have a right to have tried in the court in which the action was brought. The order directing the court below to dismiss the action will, therefore, be vacated, and the cause remanded to the court below with directions to overrule the demurrer to the answer, and to proceed according to law.

HOYT, STILES, SCOTT, and DUNBAR, JJ., concur.

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Mar. 1891.]Statement of the Case.

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[No. 171. Decided March 13, 1891.]

## MICHAEL MURPHY v. HUGH ROSS.

## APPEAL—FAILURE TO PERFECT.

Where an appeal is not perfected within the time prescribed by law and the rules of the supreme court, the appeal will be dismissed unless a reasonable excuse is shown for the failure.

*Appeal from Superior Court, Pierce County.*

Motion to dismiss the appeal. The appellant, in opposition to the motion, filed the affidavit of Fred T. Peet, the attorney of record in the cause below, as follows:

“That on or about the 9th day of July, A. D. 1890, this affiant duly argued a motion for a new trial before Judge Allyn in open court on behalf of said Murphy, appellant; that at that time Judge Allyn notified this affiant that he, Judge Allyn, should be absent from the State of Washington for about sixty days from said 9th or 10th of July; that in accordance with such information this affiant entered into an oral stipulation with Joseph Sessions, attorney for said Ross, appellee herein, that he might prepare his transcript and settle all questions of fact upon reasonable notice after Judge Allyn’s return to said Pierce county; that at the time of Judge Allyn’s return, this affiant having received no additional retainer from said Murphy, and knowing that said Murphy had engaged other attorneys in Tacoma in and about his business, and from the additional fact that this affiant had repeatedly notified said Murphy that something must be done in his case, said affiant believed that he was no longer employed by said Murphy in and about the said case; that on or about the 15th day of January, 1891, Joseph Sessions called at this affiant’s office and notified this affiant that the six months for appeal having run out he should issue execution forthwith if this case was not settled; thereupon this affiant notified said Murphy of this fact, and then and there said Murphy informed this affiant that he had supposed that this affiant was attending to the case all along;

that this affiant further notified said Murphy that he believed that said Murphy had a perfectly good defense on the merits of the appeal, and that he should advise said Murphy to at once perfect said appeal; that on the 10th day of February, 1891, about 1:30 P. M., said Mr. Sessions, attorney for said appellee, left at this affiant's office, in the custody of a law student, his motion to dismiss appeal and confirm judgment; that on the 24th day of February this affiant notified said Murphy that other counsel would have to be retained in the case, that this affiant's health being such that he could not properly attend to the matter; that on Thursday evening, February 26, 1891, this affiant and said Murphy duly retained the firm of Snell & Bedford as counsel in this case; that this affiant was by reason of ill health unable to attend to any law business and was confined to his bed on the 27th day of February, the day of the hearing of the motion."

*Fred T. Peet, and Snell & Bedford, for appellant.*

*Joseph Sessions, for appellee.*

The opinion of the court was delivered by

DUNBAR, J.—This is a motion to dismiss an appeal for the reason that appellant has not perfected his appeal within the time prescribed by law and the rules of this court, and affidavits and counter-affidavits are filed in support of and opposed to the motion. We do not think that the affidavit of appellant's attorney shows any legal or reasonable excuse for the failure. It follows that the motion will be sustained and the appeal dismissed, and it is so ordered.

ANDERS, C. J., and SCOTT, HOYT, and STILES, JJ., concur.

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Opinion of the Court—HOYT, J.

[No. 173. Decided March 13, 1891.]

J. B. JONES *et al.* v. CARL A. SANDER.

## APPEAL—NOTICE—PARTIES—VOIDABLE DECREE.

Where the decree in an action is such that several of the defendants, who do not join in an appeal, are prevailing parties as against those who do, notice of appeal should be served on those not joining, under the act of March 22, 1890, providing that a party desiring to appeal must serve notice on the prevailing party.

Although the pleadings may not entitle defendants in an action to affirmative relief, a decree determining the rights of defendants between each other is voidable, and not void, where the court had jurisdiction of the persons and subject-matter; and those in whose favor it establishes rights are prevailing parties.

*Appeal from Superior Court, Kittitas County.*

The facts are sufficiently stated in the opinion.

*Pruyn & Ready*, for appellants.

*Daniel Gaby*, for appellee.

The opinion of the court was delivered by

HOYT, J.—Appellee brought an action against a large number of defendants to restrain them from diverting the waters from Wilson creek so as to prevent a certain flow therein through his land situated on said creek. Some of the defendants, by way of answer, set up a claim to certain water of said creek, and asked that it be decreed to them. Upon the trial of the cause the question of the rights of the respective parties as to the waters of such creek were gone into, and the decree of the court established the same, not only as between each of such defendants and the plaintiff, but also as between such several defendants themselves. From this decree a part of the defendants have attempted to appeal. But they did not join their co-defendants, nor were notices served upon them; and it is

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contended that, for want of such joinder or notice, the attempted appeal is insufficient to give this court jurisdiction. It has been decided by this court that where a part of several co-parties appeal, they must serve notice thereof upon all the other co-parties, as required by § 454 of the code, and that a failure so to do would deprive this court of jurisdiction. See *Cline v. Mitchell*, 1 Wash. 24 (23 Pac. Rep. 1013); *Nelson v. Territory*, 1 Wash. 125 (23 Pac. Rep. 1013). These cases are decisive of the one at bar, if said § 454 and the other sections of the code to be construed in connection therewith are still in force. But appellee insists that these sections have been repealed by the act of March 22, 1890. We are inclined to think that this act does not repeal the sections of the code in question. But it is not necessary that we should here decide that question, as this attempted appeal is insufficient under the said act of March 22, 1890. By that act the party desiring to appeal must serve notice on the prevailing party; and the decree in this case was such that several of the defendants who did not join in the appeal were prevailing parties, as against those who did, and should have been served with notice.

Appellants practically concede this to be true by the terms of the decree, but they contend that the said decree is void, so far as it attempts to determine the rights of the defendants among each other; their contention in that regard being that the pleadings upon the part of such defendants did not state facts sufficient to entitle them to the relief granted. We agree with appellants that such pleadings were insufficient, and that it was error on the part of the trial court to decree affirmatively in their favor, as it did. But we cannot agree that such parts of its decree were void. It had jurisdiction of the persons; and the pleadings, though insufficient, gave it jurisdiction of the subject-matter, from which it must follow that any decree rendered therein, however erroneous, was voidable only, and not void. Until



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Argument of Counsel.

reversed, such parts of said decree were binding on all the parties to the action, and, being to a certain extent adverse to the appellants, those in whose favor they established rights were prevailing parties, within the meaning of said act, and should have been joined in the appeal, or served with notice thereof. The motion to dismiss must be granted.

ANDERS, C. J., and DUNBAR, SCOTT, and STILES, JJ.,  
concur.

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[No. 153. Decided March 14, 1891.]

THE COLUMBIA NATIONAL BANK V. ALLEN EMBREE,  
*Executor.*

COMMUNITY PROPERTY—LIABILITY FOR SEPARATE DEBTS.

Where a party dies possessed of an interest in community property which is not required to pay the community debts, and is not otherwise exempt, such interest is liable for his separate debts when his separate property is exhausted.

*Appeal from Superior Court, Columbia County.*

The facts are fully stated in the opinion.

*Edmiston & Miller*, for appellant.

The fundamental idea of the community system is, that marriage makes the man and woman partners. *De Blane v. Lynch*, 23 Tex. 25; 8 Cal. 597. Upon the dissolution of marriage, community property becomes a *primary* fund for the payment of all community debts. *Christmas v. Smith*, 10 Tex. 123. The intention of the legislature as expressed in §§ 2411, 2412, Code 1881, is to make community property a primary fund for the payment of community debts, and if this view be correct, then it must of

necessity be a secondary fund for the payment of separate debts.

*M. M. Godman*, and *S. G. Cosgrove*, for appellee.

Funds arising from the sale of community real estate should not be applied in payment of the separate debts of the deceased. Code 1881, §§ 2411, 2412; *Johnston v. San Francisco Savings Union*, 75 Cal. 134 (7 Am. St. Rep. 129). The appellant had no claim or lien against the community property during the lifetime of McGee, and could not have taken the same in payment of its debt. Code 1881, § 2410; *Smith v. Sherwin*, 11 Or. 269; *Andrews v. Andrews*, 3 Wash. T. 286; *Brotton v. Langert*, 1 Wash. 73. The mere fact of the death of McGee did not confer upon his creditors the right to subject to the satisfaction of their claims, property which before his death was not liable or chargeable with their payment. Code, §§ 2411, 2412; *Johnston v. San Francisco Savings Union*, 75 Cal. 134 (7 Am. St. Rep. 129). Under a statute similar to ours, the supreme courts of Texas and California have repeatedly held that, upon the dissolution of the marriage, by the death of one of the spouses, the community real property vests absolutely one-half in the survivor and one-half in the heirs of deceased, subject to the payment of such debts as the community property is charged with by law. In this state the community real property is charged with the payment of community debts only, and cannot be taken to satisfy the separate debt of either husband or wife. *Robinson v. McDonald*, 11 Tex. 385 (62 Am. Dec. 480); *Thompson v. Cragg*, 24 Tex. 600; *Walker v. Howard*, 34 Tex. 478; *Johnson v. Harrison*, 48 Tex. 268; *Wilson v. Helms*, 59 Tex. 680; *Cook v. Norman*, 50 Cal. 633; *Murphy's Heirs v. Jurey*, 39 La. Ann. 785 (2 So. Rep. 575); *Brotton v. Langert*, 1 Wash. 73; Code 1881, §§ 2410-12. Under the provisions of §§ 2411 and 2412 of the code, the interest of the heirs in the community real estate may be sold for the purpose of paying community debts,

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Opinion of the Court — SCOTT, J.

but if the same is sold when there are no community debts to be paid, then the purchaser does not acquire the interest of the heirs. *Bell v. Schwarz*, 56 Tex. 353; *Belcher v. Fox*, 60 Tex. 527; *Carter v. Conner*, 60 Tex. 52. If this be correct, then it follows that the interest of the heirs in the proceeds of the sale of community property cannot be taken in payment of appellant's claim.

The opinion of the court was delivered by

SCOTT, J.—The facts agreed upon are, in substance, that one William McGee died testate, his wife surviving him; that said parties owned community property in Columbia county at the time of his decease; that one Embree was appointed executor of his will; that said McGee owed the Columbia National Bank \$440, being a suretyship debt; that he left a small amount of separate estate, but not sufficient to pay the claim; that the community debts were paid by the executor, and a surplus of money was left in his hands arising from a sale of the community property; that the claim was duly presented and allowed, the separate property of deceased exhausted, and a balance of said debt remained unsatisfied. The court decreed that said indebtedness was a separate debt of the deceased, and that it was not a charge upon the community estate, or upon the decedent's interest therein.

It is not contended that this particular debt is not a separate debt of the deceased, and the sole question presented to us is whether the unpaid balance should be paid out of decedent's interest in the community property, or whether said property should go to his devisees relieved from liability therefor. It is not claimed that his said interest in the community property is exempted from the payment of this debt on any other ground than that it is a separate debt, for which it is urged that no part of the community property is liable in any event. Under our law (Code

1881, § 2411) the power to devise one-half of the community property exists in each spouse without restriction. The persons interested in the community may be entirely excluded, and the property given at will to a stranger. Certainly the separate debts of the deceased should be paid therefrom when the community debts are paid, and there is not separate property to pay them, unless such payment is prohibited by the statute. Considering all the statutes thereon, we do not think there is any such prohibition, although the section cited only expressly makes such devise subject to community debts. It is true, as contended, that it was useless in such a case to mention this class—as the liability therefor would have existed without it—unless there was an intention to exclude all others; but it seems rather to have come from inadvertence or an excess of caution—the liability for separate debts is not expressly excluded. Section 2405 provides that either spouse shall not be liable for the separate debts of the other. This only protects the separate property of the spouse not having contracted them and his or her half of the community property, and by implication would leave the other half of the community property liable therefor. These laws were evidently passed at the same time, and it might be said with equal force that, in so far as separate debts contracted after marriage are concerned, in the light of our other statutes relating thereto there was no reason for this particular statute, if § 2411 (and 2412, where party dies intestate) prohibits the payment of separate debts from the community property, for the separate property of the other spouse or such spouse's interest in the community property would not have been liable therefor without § 2405.

While the law relating to our probate practice is somewhat confused, yet it is apparent—as no other way is provided—that upon the death of a person his separate estate and his interest in the community property is administered

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upon in the same proceeding, even though there may be no express provision therefor, and although his interest in partnership property is particularly mentioned. See § 1435 and following sections. This would clearly be so in the execution of a will, and it must necessarily be the case where a person dies intestate. Section 1419 provides that when, by reason of a suit concerning the proof of a will or from any other cause, there shall be a delay in granting letters testamentary or of administration, a special administrator shall be appointed to collect and preserve the effects of the deceased. Section 1444 gives every executor or administrator a right to the immediate possession of all the real as well as personal estate of the deceased, and § 1445 requires him to make a true inventory thereof. By § 1465 the executor or administrator is required to publish a notice to the creditors of the deceased requiring all persons having claims against the deceased to present them, etc. Section 1479 prohibits the issuance of an execution upon any judgment rendered against the testator or intestate. Section 1528 requires the executor or administrator to take into his possession all the estate of the deceased, and § 1562 requires the debts of the estate to be paid in the order there specified; the fifth classification relates to judgments against the deceased. The word "estate" must be held to relate to the separate property of the deceased, and as well to his interest in the community property, and the debts referred to include separate debts as well as those against the community. There are other provisions of the same general purport, to which it is unnecessary to further allude. It is urged that these statutes were passed before the law relating to community property was adopted here, and that consequently they can have no bearing. But considering the fact that no other provision has been made for administering upon the estate, separate or community, and the

practice that has obtained, it must be held that it was understood, when the community laws relating to husband and wife were passed, that they were enacted in view of the probate law as it then existed, and that it was sufficient for a general and complete administration, even if there was no other answer. His separate estate not otherwise exempt would be liable for the community debts, at any rate after the separate debts were paid and the community property exhausted. The only reason for exempting community property from the separate debts of either spouse is for the benefit of the community, and when this is dissolved the reason no longer exists. We do not decide that the interest in the community property of a contracting spouse may not be reached during the lifetime of the community for a separate debt, although such exemption may necessarily follow. But when the community is dissolved by death, or in any other way, the interest in the property thereof of the party owing a separate debt, which interest is not required to pay the community debts, and not otherwise exempt, is held liable for such separate debt when the separate property is exhausted. Reversed and remanded.

ANDERS, C. J., and DUNBAR, STILES, and HOYT, JJ., concur.

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Syllabus.

[No. 98. Decided April 6, 1891.]

ELISHA P. FERRY, EBEN SMITH, AND DAVID KELLOGG,  
*Executors of the last Will and Testament of George D.*  
*Hill, Deceased, et al.* v. THE COUNTY OF KING *et al.*

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COUNTY TREASURER—ACTION ON BOND—REFEREE'S FINDINGS—  
 COUNTY COMMISSIONERS—POWERS OF—ACCOUNTS.

On the appeal of an action tried before a referee, the supreme court will assume, in the absence of the evidence, that the facts found by the referee are true, and that the evidence warranted the findings.

In an action on the bond of a county treasurer, the findings by a referee that the principal defendant was the duly elected and qualified treasurer of the county at the time complained of; that he and his sureties executed the bond described in the complaint; that while acting as such county treasurer, he received for the use of said county divers large sums of money, and that he did not account to the proper authorities for all the money so received by him; and that through mistakes and errors on the part of said treasurer, the auditor and the board of county commissioners, said treasurer did not pay over to his successor in office a certain sum out of the moneys received by him as treasurer for the use of said county, are sufficient to justify the conclusion of law by the referee that plaintiff was entitled to judgment against the defendants for said sum of money not accounted for.

Under the organic act of the Territory of Washington (Rev. St. U. S., § 1907), boards of county commissioners could not be clothed with judicial powers, even by act of the legislature, and the power exercised by said boards in making settlements with county treasurers is of a ministerial character, and not binding upon the county.

Where the accounts sued on are public accounts, equally accessible to defendants as to plaintiff, it is not error for the court to refuse to order plaintiff to furnish a bill of particulars to defendants, as it is a matter resting largely in the discretion of the trial court whether a bill of particulars should or should not be ordered in a particular case.

*Error to District Court, King County.*

The facts are sufficiently stated in the opinion.

*J. C. Haines*, and *Thomas Burke*, for plaintiffs in error.

The board of county commissioners acts in a judicial capacity, and their action is in the nature of a judicial decision which cannot be attacked collaterally. *Board, etc., v. Gregory*, 42 Ind. 32; *Board, etc., v. Saunders*, 17 Ind. 437; *Supervisors, etc., v. Briggs*, 2 Denio, 38; *Ely v. County of Morgan*, 112 Ind. 361; *White v. Fleming*, 114 Ind. 560; *Prezinger v. Harness*, 114 Ind. 491; *Colusa County v. Jarnett*, 55 Cal. 375; *Brewer v. Boston, etc., R. R. Co.*, 113 Mass. 52; *Snelson v. State*, 16 Ind. 29; *Lyons v. Miller*, 17 Ind. 250; *Cuthbert v. Lewis*, 6 Ala. 262; *Young v. Sellers*, 106 Ind. 102.

*Ronald & Piles*, and *W. S. Bush*, for defendant in error.

There is nothing in our statute which makes the settlement with the treasurer a stated account which cannot be re-examined. The county board is not a judicial tribunal in examining his accounts. See *Board of Supervisors v. Catlett's Ex'rs*, 86 Va. 158 (9 S. E. Rep. 1001); *State v. Staley*, 38 Ohio St. 267; *Ohning v. Evansville*, 66 Ind. 59; *Graham v. State ex rel. Board*, 66 Ind. 388; *Hunt v. State*, 93 Ind. 311.

A bill of particulars need not be required of the plaintiff as to matters quite within the defendant's knowledge, and as to which such a bill is wholly unnecessary. *Hayes v. Davidson*, 33 Hun, 446. In an action where the ordering of a bill of particulars is a matter of discretion, one will not be ordered where, for anything that appears, the defendant is as well acquainted as the plaintiff with the nature and particulars of the claim, and has all the knowledge necessary for him to prepare an answer to the complaint. *Powers v. Hughes*, 39 Superior Ct. (N. Y.) 482; *People v. Tweed*, 5 Hun, 353.



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Apr. 1891.] Opinion of the Court — ANDERS, C. J.

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The opinion of the court was delivered by

ANDERS, C. J.—This was an action by defendant in error, King county, against George D. Hill and his sureties upon his official bond as county treasurer of said county, to recover a specified sum of money alleged to have been received by said Hill, as such treasurer, for the use of said county during his official term of two years, commencing on the first Monday in January, 1881, but which he failed to account for to the proper authorities, or to pay over to his successor in office, as required by law. The cause was tried by a referee, who, having heard the testimony, reported the same, together with his findings of fact and conclusions of law, to the court. The referee found, in substance, that the said George D. Hill was the duly elected, qualified, and acting treasurer of the county of King for the term of two years from and after the second Monday of January, 1881; that he, as principal, with the other defendants as his sureties, duly executed the bond set forth in the complaint; that he attended before the board of county commissioners of said county with his books and vouchers, and made settlement of his accounts with said board, as required by law, for and during his said term of office, and received the credits in his several accounts mentioned in the answers of the defendants in this action; that during his term of office as such county treasurer, and while acting as such, he had and received, for the use of said county of King, divers large sums of money, amounting in the aggregate to the sum of \$190,297.02; that he did not account to the proper authorities for all the money so received by him; that of the money so received by him for the use of said county he did not account to the proper authorities for, and did not pay over to his successor in office, the sum of \$12,472.16, and that said failure to account for and to pay over to his successor in office said

last named sum was occasioned by, and was the result of, mistakes and errors on the part of said Hill and the county auditor of said King county in the book accounts kept by them, respectively, and of mistakes and errors on the part of the board of county commissioners of said county in the settlements had by them with said Hill on account of the money so by him received as treasurer for the use of said county. The said report of the referee also specifies the particular accounts in which the said mistakes and errors occurred, but which it is not necessary here to enumerate. And as a conclusion of law deduced from the facts set forth, the referee found that the plaintiff, the county of King, was entitled to a judgment against the defendants for the sum of \$12,472.16, with interest thereon from the — day of January, 1883, at the rate of ten per cent. per annum, together with the costs and disbursements of the action. The defendants filed a motion to set aside the report of the referee, and for a new trial, which motion was denied by the court. Judgment was thereupon entered for the plaintiff in accordance with the referee's report, to reverse which defendants have brought the cause to this court by writ of error.

Eleven different errors, alleged to have been committed by the court below, are assigned by plaintiffs in error as grounds for reversal of the judgment. The first ten specifications of error refer almost exclusively to the rulings of the court in settling the pleadings in the case. They are not discussed in the brief of counsel for plaintiffs in error, and therefore might properly be treated as waived; but we have nevertheless examined the record touching these objections, and are unable to perceive any substantial error therein. The eleventh assignment is, that the court erred in denying the motion of defendants to set aside the report of the referee, and to grant a new trial. Our statute provides that upon a motion to set aside the report of a

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Apr. 1891.] Opinion of the Court—ANDERS, C. J.

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referee the conclusions thereof shall be deemed and considered as a verdict of the jury (see Code, § 256), and in no case will such report be set aside except for reasons which would make it the clear duty of the trial judge to set aside a verdict and order a new trial. There is neither a bill of exceptions, nor the evidence given before the referee, in the record in this case, and we can, therefore, only consider the legal effect of the facts found by the referee. And we must assume, in the absence of the evidence, not only that the facts found are true, but also that the evidence warranted the findings. *Gardiner v. Schwab*, 110 N. Y. 650 (17 N. E. Rep. 732). We are of the opinion that the facts found fully justify the conclusions of law arrived at by the referee, and we cannot say that the court erred in refusing to set aside his report. But the learned counsel for the plaintiffs in error contends that the settlement of the accounts of the treasurer, Hill, with the board of county commissioners is conclusive between the parties; that the board of commissioners, in making such settlement, acted in a judicial capacity; and that their decision cannot be collaterally attacked. But we think the position of counsel is clearly untenable. The judicial power of the late territory of Washington was vested by the organic act in a supreme court, district courts, probate courts, and in justices of the peace. See § 1907, Rev. St. U. S. It follows, therefore, that boards of county commissioners could not have been clothed with judicial powers or functions, even by an act of the legislature, and much less could they exercise such functions in the absence of legislative enactment. The power exercised by the board of county commissioners in making settlements with the treasurer of their county is of a purely ministerial character, and such settlements do not partake of the nature of judicial decisions, and are not binding upon the county. The commissioners and the treasurer are alike agents of the county, and the

acts or omissions of one agent in the discharge of duties imposed by law can in no way affect the obligations of the other to the common principal. *Board v. Otis*, 62 N. Y. 88, 92; *Mayor, etc., v. Stout*, 52 N. J. Law, 35 (18 Atl. Rep. 943); *Hunt v. State*, 93 Ind. 311. It was the duty of the defendant Hill to properly account for all moneys received as county treasurer, and to pay over to his successor in office, at the expiration of his official term, all money belonging to the county then in his hands; and there was no law authorizing the county commissioners to absolve him from the performance of that duty. *Dillon v. Spokane Co.*, 3 Wash. T. 498 (17 Pac. Rep. 889). His settlement with the county commissioners was only *prima facie* evidence of the correctness of his accounts, and cannot be pleaded as an estoppel. 3 Wash. T. 500 (17 Pac. Rep. 890); *Jefferson Co. v. Jones*, 19 Wis. 51; *Nolley v. Callaway Co. Ct.*, 11 Mo. 447, 457; *Board v. Otis, supra*.

It is further contended by plaintiffs in error that it was error on the part of the court to admit in evidence, over defendants' objection, the particular items of the accounts mentioned in the complaint, for the reason that the plaintiffs had failed to furnish a copy of the same to defendants within ten days after demand thereof in writing, as provided by law. The code provides that it shall not be necessary for a party to set forth in a pleading a copy of the instrument in writing, or the items of an account therein alleged; but unless he file a verified copy thereof with such pleadings, and serve the same on the adverse party, he shall, within ten days after a demand thereof in writing, deliver to the adverse party a copy of such instrument of writing, or the items of account, verified by his own oath or that of his agent or attorney, or be precluded from giving evidence thereof; and the court may in all cases order a bill of particulars of the claim of either party to be furnished. Code of Washington, § 93. This action is upon

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Apr. 1891.] Opinion of the Court — ANDERS, C. J.

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an instrument in writing, and not upon an account; and the plaintiffs, having set forth a copy of the bond in the complaint, which was duly verified, substantially complied with the provisions of the statute in that particular. The execution of the bond was not denied by the defendants, and the breaches of its conditions were set out in the complaint. The accounts alleged to be incorrect were public accounts, and were kept by the defendant Hill, and it does not appear that they were not equally as accessible to defendants as to plaintiffs. The object of a bill of particulars or the items of an account is to apprise the defendant of the nature and extent of the cause of action in order that he may plead with greater certainty. *Waterman v. Mattair*, 5 Fla. 211, 213. See, also, Boone, Code Pl., § 125. And if the defendant himself has the means of obtaining such information, there is no reason for ordering the plaintiff to furnish it to him. Whether a bill of particulars should or should not be ordered in a particular case is a matter resting largely in the discretion of the trial court. *People v. Gibbs*, 93 N. Y. 470. The court below refused to order the plaintiffs to furnish a bill of particulars; and in the absence of anything indicating that the defendants were prejudiced thereby, we would not feel justified in disturbing its ruling.

Since the trial of this cause in the court below the defendants George D. Hill and D. M. Hyde have died, and their respective personal representatives have been substituted, and the action continued in accordance with the provisions of the statute. Perceiving no error in the record, the judgment of the court below is affirmed.

SCOTT, DUNBAR, and STILES, JJ., concur.

HOYT, J., not sitting.

[No. 99. Decided April 6, 1891.]

ELISHA P. FERRY *et al.* v. THE COUNTY OF KING *et al.*

*Error to District Court, King County.*

*Thomas Burke*, and *J. C. Haines*, for plaintiffs in error.

*Ronald & Piles*, and *W. S. Bush*, for defendants in error.

ANDERS, C. J.—This action involves precisely the same questions presented in the case of *Ferry v. King Co.*, *ante*, p. 337. The two causes were submitted together upon the printed briefs of counsel; and for the reasons given in the opinion in the former case, herewith filed, the judgment of the lower court is affirmed.

STILES, DUNBAR, and SCOTT, JJ., concur.

HOYT, J., not sitting.

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[No. 144. Decided April 7, 1891.]

HENRY S. ALGER v. ALICE S. HILL, *Executrix of W. C. Hill*, AND J. VANCE LEWIS.

PUBLIC LANDS—TOWN SITES—MUNICIPAL INCORPORATIONS—  
KNOWLEDGE OF ENTRYMAN.

The special act of the territorial legislature of Washington (Laws 1869, p. 437), incorporating the city of Seattle, does not come within the prohibition of the organic act (Rev. St. U. S., § 1889) against granting private charters or special privileges, as such act of incorporation is the grant of a public charter.

Plaintiff's grantor in 1874 pre-empted vacant, unoccupied public lands which had been included in the corporate limits of the city of Seattle in the year 1869 by the act of the territorial legislature incorporating said city, and did not ascertain until after entry that the land was within said corporate limits. The secretary of the

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Apr. 1891.]      Opinion of the Court—STILES, J.

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interior, in 1879, canceled the entry, on the ground that, as plaintiff's grantor was at the time marshal of the city of Seattle, he must, by virtue of his office, have known that the land pre-empted was within the corporate limits. *Held*, That the secretary's decision was erroneous, as, under § 2 of the act of congress of March 3, 1877 (19 U. S. St. at Large, 392), confirming entries which, though regular in other respects, had theretofore been allowed upon lands afterward ascertained to have been embraced in the corporate limits of any town, no knowledge of the law or the fact of incorporation can be imputed to the entryman. (HOYT, J., dissents.)

*Appeal from Superior Court, King County.*

The facts are sufficiently stated in the opinion.

*Struve, Haines & McMicken*, for appellant.

*Junius Rochester*, for appellees.

The opinion of the court was delivered by

STILES, J.—This was the usual action to have the patentee of lands from the United States held the trustee of one claiming to have had the equitable title to the land under a prior pre-emption which had been canceled by the department of the interior. The pre-emption declaratory statement was filed June 26, 1874; final proof was made May 4, 1875, and the certificate of entry was issued by the register and receiver on the same day. The entryman was one Minnick, who conveyed the land by deed to the appellant (plaintiff below) a few days later. On the 12th of January, 1877, the commissioner of the general land office, without any notice to the grantee of Minnick, ordered a cancellation of the entry on the records of the general land office, and on the 19th day of March, 1879, the secretary of the interior, on appeal, affirmed the decision of the commissioner and made the cancellation final. The defendants' general demurrer to the complaint was sustained and the action dismissed. Error is assigned upon the judgment against the plaintiff, he having declined to plead further.

The pre-emption entry was canceled because the land was within the boundaries of the city of Seattle, as defined by the act of December 2, 1869, incorporating that city; the secretary of the interior holding that the act of congress of March 3, 1877, did not avail anything to Minnick, who was marshal of the city of Seattle, and by virtue of his office must have known the land in question to be within the city limits.

The defendant's decedent, W. C. Hill, and J. Vance Lewis, in 1880, entered the land with Porterfield scrip, and received patent therefor January 9, 1882. The complaint showed all the facts, and contained these allegations in paragraph 9:

“That after the allowance of said pre-emption entry by said Minnick, it was ascertained by said Minnick and by the said commissioner of the general land office, and by said secretary of the interior, that the same was embraced within the limits of the city of Seattle, as fixed by said legislative assembly, by said void and invalid act approved December 2, 1869, which is hereby referred to, and by such reference is made a part of this complaint, and that thereafter and before the cancellation of said entry by said commissioner and said secretary, it was duly shown to the satisfaction of the said commissioner and said secretary that said entry of said Minnick included only vacant, unoccupied lands of the United States, at the date of the said Minnick's said settlement, nor settled upon or used for any municipal purposes nor devoted to any public use of any town, and that said entry was regular in all other respects.”

The first point urged by appellant is, that the act of 1869 was void, because the incorporation of cities and towns was not within the powers conferred upon territorial legislatures, quoting Rev. St. U. S., § 1889, prohibiting the granting of private charters or special privileges. The act of congress, June 8, 1878, limited the construction of § 1889, and under it the supreme court of the territory, in *Seattle v. Yesler*, 1 Wash. T. 571, held that the city of Seattle was



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*de jure* a corporation from the date of the incorporation act in 1869. If, however, the claim of Minnick was carried to entry before the act of 1878, and the territorial act of incorporation was void, the act of congress could have had no effect to carry his land within corporate limits which had theretofore no legal existence so as to deprive him of rights under the land laws. But we see no reason why the territorial legislature did not have full liberty and power to incorporate cities and towns before 1878. Almost every territorial legislature had assumed that authority, and no one even questioned it successfully, so far as reported. To thus incorporate a town or city was not to grant a "private charter" but a public charter—a means of assisting the territory to carry on orderly government, as well as to advance the convenience and interest of a large body of citizens. The separation of the territory into counties, townships, school districts and road districts was an exercise of the same class of powers, which was universal and was never objected to. The act of congress of March 3, 1877, hereafter referred to, impliedly recognized these corporations by requiring the secretaries of the territories to forward such incorporation acts to the surveyors-general.

It remains to consider the effect of the act of March 3, 1877 (19 U. S. St. at Large, 392). Prior to this act the several pre-emption acts of congress authorized public lands to be entered and patented by municipal corporations and incorporated towns, to the extent of not exceeding 2,240 acres, and reserved all lands within the limits of any incorporated town from sale under the pre-emption and homestead laws. Through the action of the states and territories, however, the object of the statute, which was to reserve sufficient land for town-site purposes, was perverted by including areas far beyond the legal limits of town sites in acts of incorporation. At the same time there was no

statutory machinery by which the land officers could ascertain the lawful areas to which towns were entitled. Consequently settlement was prevented, in many instances, on land which there was no reason for withholding, except the letter of the statute. The act of 1869 included in the limits of Seattle more than ten thousand acres of land and water, some of which was public land; though, as found by the secretary of the interior in *Lewis & Hill v. Seattle*, 8 Copp's L. O. 143, Seattle was wholly located on private land, and was not, therefore, authorized to enter any land. To remedy this state of things congress, in 1877, revised the whole matter and enlarged the actual area which might be reserved to 2,560 acres. But § 3 of the act defines the duties of the land officers in such a way that after that time no person who desires to take up public land can be debarred from doing so very long by reason of over liberal corporation acts where the land is not actually occupied and used for municipal purposes. The municipal authorities can be required upon sixty days' notice to elect where they will have the city boundaries under this act, in compact form, and not including more than 2,560 acres, unless lands in excess of that are actually occupied; and if they do not act, the commissioner may take steps to determine the proper site, and declare all the remaining lands open to entry under the homestead and pre-emption laws. To aid the commissioner in arriving at the actual area included in corporation limits under territorial laws, the secretary of each territory was required to furnish to the surveyor-general a certified copy of every legislative act of incorporation. Thus, from March 3, 1877, a proposing settler upon public land, within the limits of a town incorporated under territorial statutes, if the boundaries exceeded those allowed by the statute of that date, could cause the machinery of the land office to be set in motion, and in due time have his land restored to the public domain and opened to his entry.

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Congress was not satisfied, however, with providing for the future, but the second section of the act went back and confirmed all entries which had been heretofore allowed upon lands "afterward ascertained" to have been embraced in the corporate limits of any town, but which entries are or shall be shown to the satisfaction of the commissioner of the general land office to include only vacant, unoccupied lands of the United States, not settled upon or used for municipal purposes, nor devoted to any public use of such town, and which were regular in other respects, and authorized such entries to progress to patent. This curative provision embraced Minnick's entry, unless there was something in the facts which would prevent the act from applying to it. The land officers found that the fact that the land was within the limits of the city of Seattle, under the territorial act of 1869, was not "ascertained" after the date of the entry, May 4, 1875, and therefore the provision of 1877 could not apply, and canceled the entry in 1879. The complaint alleges that this fact was ascertained by Minnick and the land officers after the entry; and this makes the vital issue in this case. The land officers base their findings, not upon proof of the fact that Minnick had knowledge that the city limits included his land, nor upon the presumption that as a citizen of the territory he was presumed to know its public laws, but upon the fact that he was city marshal. The presumption that he would know the law would seem to be the stronger ground, since, although he was the marshal, his duties as a peace officer might never have drawn his attention to the fact that this vacant and unoccupied land was within his jurisdiction. To be elected to an office sometimes has its disadvantages, but we have yet to learn that one of these is to throw the presumption upon the officer of a greater knowledge of the public law than that of any other citizen, especially when the law affects his right to take lands under the pre-emption

statutes. Upon the ground asserted, therefore, the land officers' decision was erroneous. The territorial statute, on the other hand, included the land in the city of Seattle; and if the rule that every one is presumed to know the law were to have force in this connection, Minnick knew in 1874 that his land was not subject to entry. But upon such a basis, the act of 1877 could have no effect in any case, since every entryman of land within an incorporated town would have had the same presumption against him from the inception of his claim. The "ascertainment" of the status of the land would have dated from the passage of the act of incorporation, so far as the entryman was concerned, and there could be no possible case for the provisions of § 2.

The solution of this difficulty seems reasonably clear. The land laws of the United States do not depend upon, or have any connection with, the statutes of the states or territories. The land department surveys the public lands, records the surveys upon plats and in field notes, and prepares the way for the settler to deal with the officers. If at the time of the survey of lands a town is found thereon, it is noted upon the plats where every one can see, and is charged with notice of it. If the town springs up after the plat is filed, and becomes incorporated, at least since the act of 1877, abundant provisions have existed whereby the lawful area of the town can be noted and reserved upon the plats. But the plats on file in the public land offices, where people resort to find what lands are subject to entry, unless the municipal authorities have acted in the matter, show no town-site reservations; and therefore registers and receivers frequently allowed entries of land within these legislative limits wherever the conditions were that the lands were vacant and unoccupied and there were no adverse claims. *United States v. Schurz*, 102 U. S. 378. In 1877, therefore, this state of things existed. En-

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tries had been made, patents in many instances had been issued, in others certificates of entry only had been given, and numerous suits, claims and contests resulted from the loose condition of the laws. Congress, to mend the matter, first validated all entries where any error of law had theretofore occurred, and then provided a means by which such things could not happen thereafter. This was a plain, common sense course. The error made in allowing entries within incorporated towns was that of the government itself, through its officers; but it did no real injury to the government, since the price was the same to the individual or to the town, and the entries confirmed were of vacant, unoccupied lands, wherein the entryman had meritorious claims through having otherwise complied with the law. To the entryman no knowledge of the law or the fact was imputed under this act; and tried by this interpretation, Minnick was entitled to have the benefit of its provision.

We hold, therefore, that the complaint, on the point in controversy, was good, and that the demurrer should have been overruled. Judgment reversed, with instructions to the court to overrule the demurrer and proceed with the cause.

ANDERS, C. J., and DUNBAR and SCOTT, JJ., concur.

HOYT, J. (*dissenting*).—I am unable to agree with the conclusions of the majority of the court as to the effect of the act of March 3, 1877, upon Minnick's entry. I think that it appears from the complaint that the secretary of the interior found as a fact that Minnick had *actual* knowledge that the land in question was within the corporate limits of Seattle at the time he made his entry thereof. And this finding of fact, under the circumstances set up in the complaint, is conclusive upon all parties, and cannot be questioned in the courts. Upon finding this fact of *actual* knowledge by Minnick that the land was not subject to

entry, the secretary of the interior found as a question of law, that his entry was not aided by the said act of 1877. I think that this finding of law was correct. It is not reasonable to suppose that congress by said act intended to aid one who willfully and with full knowledge attempted to acquire title to the land that the law had declared he should not obtain. The statute as construed by the secretary of the interior is a reasonable one, and as thus construed protects every one who had in actual good faith entered land within the limits of any incorporated town. Those who entered in bad faith ought not to be protected. Besides, there is some doubt as to whether or not said curative act applied at all to this entry, for the reason that before it was passed such entry had been ordered canceled by the commissioner of the general land office. In my opinion the judgment should be affirmed.

[No. 192. Decided April 29, 1891.]

D. F. MURRY v. CHARLES T. FAY, LAMMON E. SAMPSON,  
AND JOSEPH JOHNS, *Commissioners of Pierce County.*

COUNTY BONDS—POWER TO ISSUE—CONSTRUCTION OF STATUTE.

Under the act of March 21, 1890 (Laws 1889-90, p. 37), the board of county commissioners of any county can issue bonds of the county for the funding of outstanding warrants without a vote of the people of the county, where the amount of the existing indebtedness of said county is less than one and one-half per centum of the taxable property of said county, as ascertained by the last assessment for state and county purposes.

*Certified from Superior Court, Pierce County.*

The facts are fully stated in the opinion.

A. E. Joab, for plaintiff.  
W. H. Snell, for defendants.

2	352
2	678
2	352
4	132
26*	533
29*	935
2	352
8	401
8	405
26*	533
36*	320
36*	321
2	352
14	663

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Apr. 1891.] Opinion of the Court — ANDERS, C. J.

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The opinion of the court was delivered by

ANDERS, C. J. — This was an action brought by plaintiff, who is a resident and tax-payer of Pierce county, in this state, against the defendants, who are county commissioners of said county, to restrain said commissioners from issuing the negotiable bonds of the county to the amount of \$200,000 for the purpose of funding the outstanding county indebtedness, without first submitting the question of issuance to the voters of the county. It is substantially alleged in the complaint that the indebtedness proposed to be funded by the issuance of said funding bonds, together with the existing indebtedness of said county, will not exceed the sum of one and one-half per centum of the taxable property of said county, as ascertained by the last assessment thereof for state and county purposes; that the defendants, the county commissioners of said county, intend and are now about to issue said bonds in accordance with the terms of previous resolutions of the board (which are set forth in the complaint), and that they have not complied with the precedent conditions and requirements of the act of the legislature of the state approved March 21, 1890, entitled "An act authorizing and empowering the organized counties of the State of Washington to contract indebtedness, to issue bonds for funding the same, and declaring an emergency," in this, that the said commissioners have not submitted to the voters of said county, at an election held under the provisions of the act of the legislature above referred to, the question of issuing bonds to procure money for strictly county purposes, nor have three-fifths of the voters of the said county assented thereto; and that the defendants passed said resolution and propose to issue said bonds without first submitting said question of the issuance of said bonds to the voters of said county. It is also set up in the complaint that if the said commissioners

are allowed and permitted to so issue said bonds, without having first complied with the conditions of the said act of the legislature, the same will be illegal and void, and the plaintiff and all tax-payers of said county will suffer great, unnecessary and unjust costs and damages. To this complaint a general demurrer was interposed, which the court sustained, and caused a judgment to be entered *pro forma* dismissing the action. The judge who tried the case below, being of the opinion that the cause involved the determination of the proper construction of the statutes of this state in relation to the issuance of bonds by the several counties of the state, and that it was desirable to have the opinion of the supreme court upon said question, ordered and directed the proceedings to be brought to this court for determination of the following questions: (1) Can the board of county commissioners issue bonds of the county for the funding of outstanding warrants without a vote of the people of the county, where the amount of the existing indebtedness of said county is less than one and one-half per centum of the taxable property of said county, as ascertained by the last assessment for state and county purposes? (2) Can the board of county commissioners issue the bonds of said county for county purposes without being authorized by the vote of the people of said county, where the amount of said bonds, together with the outstanding indebtedness of said county, does not exceed one and one-half per centum of the taxable property of said county, as ascertained by the last assessment for state and county purposes?

The first section of the funding bond act of March 21, 1890, empowers each and every organized county in this state, by and through its board of county commissioners, to contract indebtedness for general county purposes, in any manner, when they deem it advisable, not exceeding an amount, together with the existing indebtedness of such county, of one and one-half per centum of the taxable



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Apr. 1891.] Opinion of the Court — ANDERS, C. J.

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property in such county, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness. Laws 1889-90, p. 37. Section 2 of the act provides that such counties may contract indebtedness for strictly county purposes in excess of the amount named in the preceding section (1), but not exceeding in amount, together with existing indebtedness, five per centum of the taxable property, to be ascertained as provided in § 1, whenever three-fifths of the voters of the county assent thereto at a general or special election to be held for that purpose consistent with the general election laws. Neither of these sections make any provision for issuing bonds of the county to pay or fund indebtedness contracted as therein specified. That authority is conferred by the third section only. And it would be clear beyond a doubt that the legislature by that section intended to empower the county commissioners to issue bonds to pay or fund existing county indebtedness within the limits prescribed in § 1 without submitting the question to the vote of the people, were it not for the words at the close of the section, "then the board of county commissioners of such county is authorized and empowered to issue its negotiable bonds in the name of the county for the purposes for which such election was held." The words "such election" would seem, however, to refer to the election mentioned in a preceding part of the section, which must be held whenever the board of commissioners shall submit to the voters of the county the question of issuing bonds to procure money (not to fund existing indebtedness) for strictly county purposes. That is the only election mentioned which, in terms, is required to authorize the board of commissioners to issue county bonds. But the expression, "for the purpose for which such election was held," when read in connection with the first clause of the section, renders the meaning ambiguous, and we must

therefore ascertain the intention of the legislature by the application of authorized rules of construction. One of these rules is that, if a literal interpretation of any part of a statute would be contrary to the evident meaning of the act taken as a whole, it should be rejected; and the best way to discover the meaning when expressions are rendered ambiguous by their connection with other clauses is to consider the object of the law and the causes which led to its enactment. *Heydenfeldt v. Daney Gold, etc., Co.*, 93 U. S. 634, 638; *Lamp Chimney Co. v. Brass and Copper Co.*, 91 U. S. 656, 662. Another rule is, that "a thing within the intention is as much within the statute as if it were within the letter; and a thing within the letter is not within the statute if contrary to the intention of it." *People v. Utica Insurance Co.*, 15 Johns. 358, 381 (8 Am. Dec. 243); *Insurance Co. v. Gridley*, 100 U. S. 614. Before the passage of this act no provision had been made for funding county indebtedness contracted after January 1, 1888. Many of the counties were paying ten per cent. interest per annum upon their outstanding warrants; and one of the objects of the statute was to provide for funding such indebtedness at a lower rate of interest, and thus relieve the tax-payer of a portion of his burdens. And from these circumstances, and from the history of this legislation, we are convinced that the legislature intended, as did the framers and promoters of the act, to provide for funding existing county indebtedness, lawfully incurred, without the expense and delay incident to submitting the question of issuing bonds to a vote of the people. This intention will be clearly expressed, and all parts of § 3 be made to harmonize with each other, by rejecting the words last above quoted, as not being applicable to cases of indebtedness incurred, as in this instance, under the provisions of § 1 of the act. No other construction of the statute will relieve it from ambiguity, or express what we believe to be its intention. The first

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**Apr. 1891.]      Opinion of the Court — ANDERS, C. J.**

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question propounded by the court below is therefore answered in the affirmative. The majority of the court being of the opinion that the second question is not involved in the case now before us, it will not now be decided. The cause will be remanded to the court below, with instructions to enter final judgment for defendants.

**STILES, HOYT, and DUNBAR, JJ., concur.**

**SCOTT, J.,** did not sit at the hearing.

REPORTS OF CASES  
 DECIDED IN  
**THE SUPREME COURT**  
 OF THE  
 STATE OF WASHINGTON,  
 AT THE  
**MAY SESSION, 1891.**

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[No. 631. Decided May 14, 1891.]

**ALBERT FREIDRICH V. THE TERRITORY OF WASHINGTON.**

**MURDER—INDICTMENT—CHARGING JURY—COMMENT ON FACTS—  
 PREJUDICIAL ERROR—EXCEPTIONS.**

An indictment charging that defendant “purposely and of his deliberate and premeditated malice, killed one John Scherbring, then and there being, by then and there purposely, and of his deliberate and premeditated malice, shooting and thereby mortally wounding the said John Scherbring with a revolver pistol,” etc., is sufficient to charge the crime of murder in the first degree.

Section 221, subd. 6, Code 1881, requires the court, in charging the jury, to state to them all matters of law necessary for their information in finding a verdict, with only such allusion to the evidence as may be necessary; but a court oversteps the bounds of a legal charge, though telling the jury the facts are for their decision alone, where, under the guise of an illustration of the meaning of circumstantial evidence, it devotes a long, oral charge to an argument of the very facts of the case, taking up the material constituents of the territory’s case, dovetailing the facts together, and deducing and announcing a conclusion to the jury.

Although there is no exception to the whole or a part of the charge on the ground that it is an argument upon the facts, yet, in a capital case, if there is prejudicial error, which is patent upon the face of the record, denying the accused the fair and impartial trial which is his right, the supreme court will not allow these technical objections to deprive defendant of a new trial.

2	358
4	105
4	206
26*	976
29*	984
29*	1056
2	358
6	569
26*	976
34*	819
2	358
120	515
2	358
122	250

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May, 1891.]Argument of Counsel.

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*Appeal from District Court, King County.*

Trial of Albert Freidrich for murder upon an indictment as follows:

"Albert Freidrich is accused by the grand jury of the Territory of Washington for the counties of King and Kitsap, in the third judicial district of said territory, by this indictment, of the crime of murder in the first degree, committed as follows: The said Albert Freidrich, on the 14th day of July, 1887, in the county of King, in the district aforesaid, purposely, and of his deliberate and premeditated malice, killed one John Scherbring, then and there being, by then and there purposely, and of his deliberate and premeditated malice, shooting and thereby mortally wounding the said John Scherbring with a revolver pistol, which he, the said Albert Freidrich, then and there had and held, contrary," etc.

Defendant demurred to the indictment on the following grounds:

"*First*: That the same stated no facts sufficient to constitute the crime of murder.

"*Second*: That the same did not substantially conform to the Code of Washington."

The demurrer was overruled and exceptions allowed. The facts are sufficiently stated in the opinion.

*James Hamilton Lewis*, for appellant.

The indictment is insufficient; it charges no death, no time of death, or that the assailed is dead; states "no facts constituting the offense," and charges no murder. *Com. v. Adams*, 1 Gray, 481; *Com. v. Dedham*, 16 Mass. 141; *Moore v. Com.*, 6 Metc. 243 (39 Am. Dec. 724); *State v. Morgan*, 85 N. C. 581; 1 Archb. Cr. Pl. & Pr., 791, and citations; Bishop, Directions and Forms, 517; *State v. Coleman*, 17 S. C. 473; *State v. Sundheimer*, 93 Mo. 311 (6 S. W. Rep. 52); *State v. Blan*, 69 Mo. 317.

As to the court's assuming that certain facts are proved,

and singling out facts, see *White v. State*, 13 Tex. 133; Proffatt, Jury Trials, §§ 319, 320, 323, 327, 336; Harris, Crim. Law, 339, note, and cases cited; *Blackwell v. State*, 67 Ga. 76 (44 Am. Rep. 217); *Caldwell v. United States*, 8 How. 366; *Brown v. State*, 3 Tex. App. 294; *People v. Keefer*, 65 Cal. 232; *People v. Williams*, 17 Cal. 142; *People v. Hurley*, 57 Cal. 145; *Sharp v. State*, 51 Ark. 147 (14 Am. St. Rep. 27); *Leonard v. Territory*, 2 Wash. T. 381.

*John F. Miller*, Prosecuting Attorney, and *Ronald & Piles*, for The Territory.

The obvious purpose of the sections of our code prescribing general regulations as to the form and substance of indictments, is to do away with the common-law tests. *People v. King*, 27 Cal. 507 (87 Am. Dec. 95); *People v. Ah Woo*, 28 Cal. 206; *People v. White*, 34 Cal. 186; *People v. Dick*, 37 Cal. 277; *People v. Murphy*, 39 Cal. 52.

Trial by a jury in the courts of the United States is a trial presided over by a judge with authority, not only to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact; provided only he submits those questions to their determination. *U. S. v. Philadelphia, etc., R. R. Co.*, 123 U. S. 113.

This rule prevailed in our territory and in the courts of all the states wherein there was no constitutional or legislative limitation upon the subject. And it may be summed up by the statement that under it it is the office of the judge in the exercise of a sound discretion to review the evidence in his charge to the jury — arraying the testimony of the opposing witnesses, pointing out the bearings of the different elements of the evidence upon the questions in issue, intimating his opinion as to the weight of each, and illustrating his meaning and enforcing his observation in

May, 1891.]

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such manner as he thinks proper—his manner of exercising this discretionary power not being the subject of exception so long as he gives the jury distinctly to understand that his assertions are advisory merely, and that the responsibility of deciding the facts rests entirely with them. 2 Thompson on Trials, § 2294; *Ware v. Ware*, 8 Me. 42, 59; *Mansfield v. Corbin*, 4 Cush. 213; *Flanders v. Colby*, 28 N. H. 34; *Patterson v. Colebrook*, 29 N. H. 94; *Bruch v. Carter*, 32 N. J. Law, 554; *Gardner v. Picket*, 19 Wend. 186; *People v. Rathbun*, 21 Wend. 509; *McKee v. People*, 36 N. Y. 113.

The judge may read the testimony from the shorthand writer's notes, or he may recite it from memory, or he may give examples illustrating his meaning and the law, and if he instructs the jury that they are the exclusive judges of the weight to be given to the testimony, he commits no error. 2 Thompson on Trials, §§ 2281, 2282; *People v. Williams*, 59 Cal. 674; *State v. Jones*, 29 S. C. 201 (7 S. E. Rep. 296); *People v. Perry*, 65 Cal. 568; *McRae v. Lilly*, 1 Ired. L. (N. C.) 118. Stating the testimony is a very different thing from declaring what it shows; if the judge states the testimony, leaving the jury to determine what it shows, it is no error. *People v. Casey*, 65 Cal. 260; *Hawley v. Chicago, etc., R. R. Co.*, 71 Iowa, 717 (29 N. W. Rep. 187); *Andrews v. Parker*, 48 Tex. 94. Nor is it error for the court to instruct the jury that the evidence tends to prove a certain matter in issue. *Morris v. Lachman*, 68 Cal. 109; *People v. Perry*, 65 Cal. 568; *People v. Vasquez*, 49 Cal. 560; *Koerner v. State*, 98 Ind. 13; *Beattie v. Hill*, 60 Mo. 72.

The opinion of the court was delivered by

STILES, J. — The indictment was sufficient to charge the defendant with the crime of murder in the first degree. *Leonard v. Territory*, 2 Wash. T. 381 (7 Pac. Rep. 872); *Timmerman v. Territory*, 3 Wash. T. 445 (17 Pac. Rep. 624).

The appellant and the deceased had been close friends, and spent the day of July 14, 1887, in Seattle and its suburbs. They had carried beer out with them, and drank freely of it. About sunset they walked out on the Grant street bridge, and stopped for a short while at a saloon on the bridge. There they had a glass or two of beer, two other persons being present and drinking with them. They were not intoxicated, and the persons at the saloon heard no quarrel or misunderstanding between them. At about dark they left the saloon together to return to town, and within a few minutes persons in the neighborhood heard two shots on the bridge, and heard a cry of distress. Several of those who heard the shots ran in the direction from which the unusual sounds seemed to come, and found the deceased leaning over the bridge-rail, with a bullet imbedded in his head just back of the left ear. He was conscious, and able to walk with assistance. Being asked who had shot him, he answered that he did not know, and in this statement he persisted, until the appellant was brought before him, when he avowed that appellant had shot him, but gave no particulars. He gave, as a reason why he had at first said he did not know who his assailant was, that he did not then think he was very badly hurt, and did not wish to give away his friend. He died within a few days after he was shot, without making any other admissible statement. Appellant was arrested, indicted, convicted of murder in the first degree, and sentenced to death. Aside from proof of what the deceased said in the presence of the appellant, as above stated, all the evidence at the trial was circumstantial; it being devoted to showing the attempted flight of the appellant immediately after the shooting, and his confused and contradictory statements after his arrest, with the fact that, in the presence of deceased, he made no positive denial of Scherbring's charge that he had fired the fatal shot. No effort was made to show a motive for the murder.



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May, 1891.]Opinion of the Court — STILES, J.

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In answer to the territory's case, appellant took the stand as a witness in his own behalf, and denied having shot deceased, or that he knew who had shot him. He told how they had spent the day together, and claimed that immediately upon their leaving the saloon on the bridge he had left deceased, who was disposed to loiter along, and hastened ahead to attend the meeting of a German singing society of which he was a member. He did not attend the meeting, for the reason, as he claimed, that, as he approached the building, he heard the members singing, and, finding that he was late, turned away, and went elsewhere. These were the only points touched upon by him in his testimony with the exception that, whereas witnesses for the territory had stated that he was taken into Scherbring's presence twice on July 16th, he claimed to have been there but once. He did not dispute what was alleged to have been said there, nor did he in any other particular contradict the testimony of the prosecution. It will thus be seen that his testimony was of no great materiality to his defense, and there was no call for any extended cross-examination; since, in such cases, the cross-examination ought to be confined strictly to the matters touched upon by the defendant, excepting in so far as his history may be inquired into for the purpose of testing his credibility in the matters testified to by him. But here the cross-examination was extended to a very great length, with almost no reference to the examination in chief; but the defendant was taken over all the ground covered by the territory's witnesses, apparently for no other purpose than to place him in seeming hostility to them in order to discredit him by the contrast, and to have some foundation for the subsequent attack made upon his past history.

A great part of the evidence for the prosecution was directed to showing the whereabouts and actions of the defendant from the time of the shooting until his arrest, at

noon on July 15th. He was arrested at Slaughter, a number of miles south of Seattle, while walking along the railroad track, and had not been seen by any person who knew him since he and deceased left the saloon on the evening of the 14th, excepting that certain witnesses testified that they saw him on the opposite side of Seattle on the evening of the 15th. He was a shoemaker, but had not been seen at his shop from the day of the 14th. At the time of his arrest, and afterwards, the persons who arrested him endeavored to draw from him damaging statements and admissions. All these things had been testified to by the territory's witnesses; and to them the cross-examiner called his attention, and pressed him for admissions of their truth, or of the untruth of what he answered in denial or explanation of them. This was not cross-examination, but it was allowed to run itself out when the subject was exhausted, without any objection by defendant; and it is only alluded to here to show how there came to be any foundation for almost the only legitimate part of the cross-examination, viz., that wherein his past life was inquired into.

The prosecutor asked the defendant a series of questions which were intended to draw from him an admission that he was not Albert Freidrich, but one "Leubens" Freidrich, who was assumed to have been a German soldier, to have been fined in Hamburg in 1880 for a breach of the peace, and to have deserted his wife and child. Error is assigned upon the overruling of objections to these questions, and thereupon a curious state of things is presented. Against the defendant, Freidrich, the prosecution was entitled to none of the matters sought to be brought out; but, as against the witness Freidrich, it was entitled to them, to the extent that they might affect his credibility on his direct examination, but not on his cross-examination as to matters about which he had not testified in chief; for, by thus cross-examining him, the territory made him its

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Opinion of the Court—STILES, J.

own witness, and was bound by what he said. *People v. Irving*, 95 N. Y. 541. The defendant had returned negative answers to almost all questions thus asked. The prosecutor had presented to him a letter from Leubens Freidrich which he denied having written, a photograph which he admitted to be one of himself, a German army list which he declared did not describe him when a soldier, and some other papers which he said had no reference to him. After the defendant retired from the stand the prosecutor said:

“I now offer in evidence, if the court please, the depositions of the various army officers and magistrates connected with the court, which says he belonged to a company, and the fact that this is a photograph of the Leubens spoken of in these depositions. They are in German; I will have them translated.”

Upon objection the court said, “They are not admissible;” and there the matter dropped. It is now urged that this whole course of inquiry into the history of the defendant was a plan of the prosecution, to throw a cloud of suspicion over him by mere insinuation, without legal evidence tending to support it; the offer of the “depositions” being but the crowning effect in that direction. It was not fair treatment of the defendant, certainly. The outcome showed that there was no reason to expect success in the effort to identify the defendant with Leubens Freidrich. The prosecutor must have known that the “depositions” could not be received as evidence under any circumstances, and it was not proper to state in the hearing of the jury what they would show. Still, if there were nothing more objectionable in the case, we are not prepared to say that this conduct of the territory’s representative ought to reverse the judgment, although it comes dangerously near it. The duty of a prosecutor is to present to the jury the facts as they can be made to appear by legitimate testi-

mony, and when that is done his duty is ended. An offer of proof may often be made under circumstances where it is necessary to explain its connection or effect in order to show its admissibility; but such an offer presupposes some legitimate means at hand of making the proof, not an *ex parte* statement of some German military tribunal which could have no more force than waste paper. That the matter passed, in this instance, without further challenge in the court below, alone redeems it from its legitimate effect.

But this judgment must be reversed upon the court's charge to the jury. As before said, the evidence on the part of the prosecution was entirely circumstantial; but it was clearly stated, uninvolved, and straight to the point. On the other hand, the defendant rested entirely upon his own denial, the testimony of witnesses as to his good character, and the absence of proof of motive. The charge, in such a case, ought to have been confined closely to the law applicable, with only such allusion to the testimony as was necessary to make clear the law of the case. Judges of the territorial district courts, when trying criminal cases under the territorial laws, did not have the latitude accorded to judges of the United States district courts in the matter of charging the jury. Section 221, subd. 6, code, contemplated a statement of all matters of law necessary for the information of the jury in finding a verdict, and only such "allusion" to the evidence as was necessary. The discretion of the trial court was final in determining where and what allusion was necessary; but the power to allude was for the purpose of making clear the bearing of the law, and for nothing more. Therefore where, as in this case, a long and wholly oral charge was largely devoted to an argument of the very facts of the case, although carried on under the guise of an illustration of the meaning of circumstantial evidence, in which every material constituent

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May, 1891.]Opinion of the Court—STILES, J.

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of the territory's case but one was taken up, the facts dovetailed together, and a conclusion deduced and announced to the jury; and where, in reference to the one point reserved, the court's opinion was distinctly made to appear, though not stated, it is too clear for argument that, however often the jury were told that the facts were for their decision alone, the bounds of a legal charge were overstepped, greatly to the prejudice of the defendant.

As it is not possible, under our constitutional provisions, that any superior court will take the course here adopted, we shall not burden the decision with any extended extracts from the charge. The following will suffice to show the style of language used. The review commenced thus:

"Now, gentlemen, let us look at these facts dispassionately, without prejudice, and without thinking, so far as that goes, who this defendant is, or who the man that was killed was."

Then follows a narration of the actions of the defendant and the deceased up to their leaving the saloon together, and of the hearing of the shots, and the voice of Scherbring. Then, there was a discussion as to the probability that the man shot himself, or was shot by some other person, with a conclusion in favor of the latter theory, thus:

"From these circumstances, we arrive at the conclusion that the man was shot by some one other than himself."

Again:

"The question now is, who did it? That is the question that is left. If what I have said to you satisfies you that Scherbring was shot by somebody other than himself, and that he died from the wound, then the territory have proved that much of their case so that we are satisfied with it. Now, with the same impartiality, discretion and deliberation, weighing all the circumstances, we approach the other question. Did the defendant shoot him? That is the only question left."

Here occurs a review of the testimony of defendant, on

the cross-examination concerning his movements from the evening of the 14th on; and of that of the prosecution's witnesses on the same point. Speaking of the latter, there are such expressions as these:

"Do they lie about it? Did they mean to lie about it?"

Concerning defendant:

"This story that he tells you about where he went to, if it is true, notwithstanding some of it may seem a little improbable, . . . that is his story; of course, if it is true, he was not out here where Longstaff, Noonan and Stewart say they saw him."

The concluding remark was: "It is for you to say, gentlemen, whether he shot Scherbring or not;" but after so "impartial" a discussion, if any juror of the twelve had been weak enough to be influenced by what the court's opinion of the undecided fact was, his verdict could not be long doubtful.

There is a technical objection made to our consideration of the charge, under this aspect, by the counsel for the territory, because the exceptions taken immediately after its delivery, twenty-two in number, were all very brief, and each merely called the attention of the court to a phrase or two which was formally objected to. There was no exception to the whole or a part of the charge, on the ground that it was an argument upon the facts to the prejudice of the defendant. It is true that generally we expect to be called upon to pass upon those portions of a charge which are alleged to misstate the law, only when the error was called to the attention of the court below, and the objection raised by exception. But the error in this case was not one of statement concerning the law of it, which might have been corrected upon a recall of the jury. This was an error of conduct on the part of one branch of the court by assuming the functions of the other branch — an error which was

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May, 1891.]Opinion of the Court — STILES, J.

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irreparable with the jury then in the box, because the argument and conclusions rehearsed in their presence were incapable of recall; they had made their impression the instant they were uttered, and no correction from the same source would have had any effect except to confuse jurymen. This matter was fully argued in print, so that there was no surprise in this court; and, from the language of several of the exceptions actually taken, we think it probable that the same question was presented to the court below on motion for a new trial. In a capital case, if there was prejudicial error which is patent upon the face of the record, the appellate court should not allow technical objections to deprive the defendant of a new trial. Here the error was prejudicial to the extent of denying the accused that fair and impartial trial which was his right, no matter what may have been the degree or heinousness of his offense; and the error is too patent to be mistaken.

There were some specific errors which it is not necessary to notice, as they are not likely to occur upon a retrial. This holding decides the case, but we cannot refrain from going beyond the suggested errors of commission in this charge to notice one of singular omission. The opening words of the charge were: "The defendant here is charged by the grand jury of this county with having committed the crime of murder by shooting a man by the name of Scherbring on the 14th day of last July," and there all allusion to the crime charged or the elements constituting the crime ended. The indictment alleged murder in the first degree, but no explanation was given of the facts necessary to be shown to warrant a conviction, either by reading the statute or by equivalent oral statement. Nor were the jury informed that under §§ 786, 790 and 1097 of the code, if they found that the prisoner did shoot the deceased, unless they also found deliberation and premeditation, they could return a verdict of murder in the second degree only. On

the contrary, having said to them that the only question left was, "did the defendant shoot him?" the court furnished them with two forms of verdicts, the first of which was, "We, the jurors in this action, find the defendant not guilty;" and the other was, "We, the jury in this action, find the defendant guilty as charged in the indictment." The court was not called upon in this case, under the evidence, to instruct in regard to manslaughter, at least without a request therefor; but to omit to define the degrees of murder, and to give the jury the liberty of saying under which head the facts proved a crime, was so great an oversight that it is to be accounted for only upon the theory that the discussion of the facts to so much length overshadowed the fundamental law of the case, and caused it to be forgotten. The judgment is reversed, and a new trial granted.

ANDERS, C. J., and HOYT and DUNBAR, JJ., concur.

SCOTT, J., concurs in the result.

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[No. 134. Decided May 14, 1891.]

THE STATE OF WASHINGTON, *on the Relation of Dominico Coella, v. W. F. FENIMORE, Clerk of the Superior Court of Jefferson County.*

CONSTITUTIONAL LAW—COSTS ON APPEAL—DEFENDANT WITHOUT MEANS.

A person convicted of murder is entitled, on appeal, to a transcript of the record at the expense of the public on showing that he is without means and unable to pay the clerk's fees therefor. (DUNBAR, J., dissents.)

*Original Application for Mandamus.*

*John Fairfield, and Daniel Kelleher, for relator.*

*R. E. Moody, and R. A. Ballinger, for respondent.*



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May, 1891.]Opinion of the Court — HOYT, J.

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The opinion of the court was delivered by

HOYT, J. — Relator was convicted of murder in the first degree and sentenced to death. He gave notice of appeal to this court, and to perfect the same sought to have the clerk transmit a transcript of the record. The clerk declined to do this unless the fees for preparing the same were first paid. Relator thereupon showed that he was without means, and was absolutely unable to pay such fees. Under these circumstances, relator was entitled to such transcript at the expense of the public. The writ of *mandamus* must issue as prayed.

ANDERS, C. J., and STILES and SCOTT, JJ., concur.

DUNBAR, J. (*dissenting*). — I dissent. I know of no provision of law, either statutory or constitutional, empowering the court to authorize the disbursement of public funds to aid a defendant to prosecute his appeal to the supreme court. Section 22, art. 1, of the state constitution, relied upon by counsel for appellant, in my judgment does not touch this case. That section simply guarantees to the accused the right of appeal in any case; that is, provides that the right of appeal in criminal cases shall not be taken away by statute; and the final judgment referred to in said section refers to final judgment in the superior courts. Such was the construction placed upon it in *Stowe v. State*, *ante*, p. 124, decided by this court at its last term. The payment by the state of the costs of appeal in a criminal action, where the defendant is not able to pay, might be a humane policy for the law to adopt; but as the law-making power has not seen fit to adopt such a policy, it is not within the inherent power of the court to grant the relief asked for.

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Opinion of the Court—ANDERS, C. J.[2 Wash.]

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[No. 204. Decided May 14, 1891.]

## JENNIE HIGGINS v. JAMES BURNS.

## DISMISSAL OF APPEAL—FAILURE TO FILE TRANSCRIPT AND BRIEFS.

Where appellant fails to cause a transcript to be prepared, and to serve and file a brief as required by rule 6 of the supreme court, without satisfactory excuse for the failure, the appeal will be dismissed on appellee's motion therefor, accompanied by a certified copy of the judgment and notice of appeal.

*Appeal from Superior Court, Pierce County.**Town & Likens*, for appellant.*Carroll, Coiner & Davis*, for appellee.

The opinion of the court was delivered by

ANDERS, C. J.—Appellee moves to dismiss this appeal, and to affirm the judgment of the court below for the reasons: (1) That appellant has failed to cause a transcript to be prepared, and to serve and file a brief, as provided by rule 6 of this court; and (2) that the original amount in controversy herein does not exceed the sum of \$200, and the action does not involve the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. Judgment was rendered in the lower court on September 6, 1890, and on September 17, 1890, notice of appeal to the supreme court was duly given. This motion was filed on April 27, 1891, at which time no transcript had been prepared, and no briefs had been filed. No satisfactory reason or excuse is given for the failure to comply with rule 6 of this court, and, appellee having filed a certified copy of the judgment and notice of appeal, in accordance with the provisions of rule 9, the appeal will be dismissed, with costs to appellee. It is not necessary, under the cir-

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May, 1891.] Opinion of the Court — HOYT, J.

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cumstances, to consider the jurisdictional question attempted to be raised by this motion.

DUNBAR, HOYT, and STILES, JJ., concur.

SCOTT, J., not sitting.

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[No. 221. Decided May 21, 1891.]

THE STATE OF WASHINGTON, *on the Relation of William J. Rohde*, v. MORRIS B. SACHS, *Judge of the Superior Court of Jefferson County.*

CONTEMPT — SUSPENDING ATTORNEY FROM PRACTICE — MANDAMUS.

Where the superior court has fined an attorney for contempt and entered an order suspending the attorney from practice in that court until he has purged himself of the contempt by apologizing, the supreme court can intervene by *mandamus* to compel said court to vacate and set aside the order of suspension.

*Original Application for Mandamus.*

The facts are sufficiently stated in the opinion.

*R. A. Ballinger*, for relator.

*Trumbull & Plumley*, for respondent.

The opinion of the court was delivered by

HOYT, J.—By his demurrer to the alternative writ issued herein, the respondent admits the entry of an order, as follows:

“On this 28th day of March, A. D. 1891, in open court, while the Hon. Morris B. Sachs, a judge of the superior court of the State of Washington, was engaged as such judge in deciding a motion pending in the case of *Nickelsburg v. Stencil et al.*, then pending in the superior court of Jefferson county, Wash., over which the said Morris B. Sachs was then presiding as judge thereof, one William J.

2	373
3	690

2	873
82	55

2	373
39	137

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Opinion of the Court — HORT, J.

[2 Wash.]

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Rohde, an attorney of record of said court, and an attorney for the defendants in said cause, interrupted the said judge in said proceedings, and while said judge was deciding said motion, addressed said judge, and spoke in a disorderly, contemptuous and insolent manner, the following words: 'I wish the court would not talk to me.' And whereas, the said William J. Rohde in said matter was guilty of disorderly, contemptuous and insolent behavior towards the said judge, while holding said court, which said behavior of said William J. Rohde tended to impair the authority of said court, and of said judge thereof, and to interrupt in an unbecoming, disorderly, contemptuous and insolent manner the due course of the said proceedings before said court: Now, therefore, it is ordered by the said court that said William J. Rohde be and he is hereby, by reason of the aforesaid behavior, declared guilty of contempt of said court, and that he pay a fine of twenty dollars, and that he stand committed to the custody of the sheriff of Jefferson county, Wash., until the same is paid; and that it is further ordered that said William J. Rohde purge himself of said contempt."

That, upon the entry thereof, the relator, the said William J. Rohde, fully paid the fine therein imposed. That afterwards the said William J. Rohde, in behalf of a certain client, appeared in said court and asked to be heard as to the matter therein pending. Whereupon the judge thereof refused to allow said Rohde so to be heard therein, and caused to be entered on the records of the said court the further order, as follows, to wit:

"This court having on the 28th day of March, A. D. 1891, duly entered of record, and which said order adjudged and decreed that the said William J. Rohde, an attorney of record in this court, was guilty of contempt of court, and adjudged that said William J. Rohde be fined the sum of twenty dollars, and is ordered to purge himself of such contempt; and whereas, afterwards, to wit, on the said 28th day of March, A. D. 1891, the said William J. Rohde paid to the clerk of this ——— the fine assessed against him in said matter, and has neglected, failed and

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May, 1891.]Opinion of the Court—Hoyt, J.

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refused to comply with the said order of said court, and failed, neglected and refused to purge himself of said contempt by apologizing for his said disrespectful conduct: Now, on this 21st day of April, A. D. 1891, the said William J. Rohde appeared in open court, before the judge thereof; and the judge thereof, to wit, Morris B. Sachs, thereupon called the attention of said William J. Rohde to the order of this court so as aforesaid made and entered on the 28th day of March, A. D. 1891, and further called the attention of said William J. Rohde to the fact that he had so failed, neglected and refused to comply with said order; and thereupon the said William J. Rohde, still failing, neglecting and refusing to comply with said order: Wherefore it is ordered, adjudged and decreed that said William J. Rohde has violated his official oath of office as an attorney at law, and has failed to maintain the respect due to this court, and the judicial officer thereof; and it is ordered, adjudged and decreed that the said William J. Rohde is and will not be permitted to appear as an attorney or counselor before this court until he does comply with said order, and until the further order of this court."

The question presented is as to the validity of said orders, and the regularity of the action of the court in said matter. The contention of the respondent is that, although the latter part of the first order above set out, and all of the second order, may be irregular, and the action of the court in entering the same may be ground of reversal on appeal, yet as the court had jurisdiction of the subject-matter, and of the person of the relator, there can be no relief against such orders by *mandamus*. This contention is doubtless correct, if the orders entered were such as, under any state of facts connected with the proceedings, the law would authorize. We think, however, that the latter part of the said first order, if it required anything at all more than the payment of the fine mentioned in said order, required something which the court had no right, under any circumstances, to order, and that this portion of said order was therefore not only voidable, but absolutely void, and

that for that reason there was absolutely no foundation for any of the proceedings which led to the entry of the second order, and that the said second order was therefore absolutely void as an entirety. This being so, we think this court could properly intervene, and by its writ of *mandamus* require said court to vacate and set aside said last named order, especially where, as in this case, the effect of said order was to deprive the relator of his right to appear in said court as an attorney thereof. His right so to appear was property, and could not be taken from him excepting by due process of law, and this court can intervene by this writ to prevent such deprivation. It follows that the peremptory writ of *mandamus*, commanding substantially the same as the alternative writ, must issue, and it is so ordered.

ANDERS, C. J., and STILES, DUNBAR, and SCOTT, JJ., concur.

[No. 182. Decided May 22, 1891.]

NORTHERN PACIFIC RAILROAD COMPANY V. SEBASTIAN  
HAAS AND MARY HAAS.

EMINENT DOMAIN — GENERAL AND SPECIAL STATUTES — REPEAL BY  
IMPLICATION.

The intention of the legislature in enacting laws should be ascertained; and, if it sufficiently appears that it was intended that a subsequent general law should supersede all prior legislation upon the same subject, general or special, though not expressly so stated, effect should be given to such purpose.

The act of February 1, 1888 (Laws 1887-8, p. 58), providing a general and complete method of ascertaining and obtaining damages in consequence of the appropriation of land by corporations for railway purposes, requiring actions to be brought in the district court, and declaring the remedy exclusive of all others, repeals by implication the provisions of the charter of Spokane Falls (Laws 1885-6, p. 304, § 11) allowing actions for damages to abutting property from building railroads in streets to be recovered before a justice of the peace.

2	376
14	346

2	376
630	275

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May, 1891.]Argument of Counsel.

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*Appeal from Superior Court, Spokane County.*

The facts are fully stated in the opinion.

*Mitchell, Ashton & Chapman, and Griffiths, Moore & Feighan, for appellant.*

The act of February 1, 1888, expressly declares that the remedy furnished thereby shall be exclusive of all other remedies. This act then superseded all other laws of the Territory of Washington upon the subject to which it related. Endlich, Interp. St., p. 304, *et seq.*; *Pierpont v. Crouch*, 10 Cal. 315; *Christy v. Sacramento*, 39 Cal. 3; *Ex parte Smith*, 40 Cal. 419; *People v. Sargent*, 44 Cal. 430; *Hemstreet v. Wassum*, 49 Cal. 273; *Dutton v. Aurora*, 114 Ill. 138; *Frederick v. Groshon*, 30 Md. 436 (96 Am. Dec. 591); *Howe v. Starkweather*, 17 Mass. 240; *Water Commissioners v. Conkling*, 113 Ill. 344. And where the design of an act is to make a general and uniform mode or course of procedure, as was undeniably the design of the act of February 1, 1888, it is uniformly held to repeal all other acts upon the subject, general or special. Endlich, Interp. St., §§ 231, 232, notes 94 and 95, with authorities there cited; *People v. Miner*, 47 Ill. 33; *Tacoma Land Co. v. Pierce County*, 1 Wash. 482; *Gorham v. Luckett*, 6 B. Mon. 146; *Cairo v. Bross*, 9 Ill. App. 406; *Knox Co. v. McComb*, 19 Ohio St. 320; *State v. Morristown*, 33 N. J. Law, 57.

*William A. Taaffe, and Thomas B. Higgins, for appellees.*

That a general law does not repeal a local or special law on the same subject, unless so stated in express terms, must be regarded as settled in this state by the decision in *Cascade R. R. Co. v. Sohns*, 1 Wash. T. 557, where the identical question was decided on the same subject-matter. See also, *Corbett v. Territory*, 1 Wash. T. 431; Endlich, Interp. St., §§ 223-8; *McKenna v. Edmundstone*, 91 N. Y.

231; *In re Commissioners of Central Park*, 50 N. Y. 493; *Cumberland v. Magruder*, 34 Md. 381. And this is so, though the general law contains a general repealing clause. *Whipple v. Christian*, 80 N. Y. 523; *Van Denburgh v. Village of Greenbush*, 66 N. Y. 1; *Bowen v. Lease*, 5 Hill, 225; *In re The Evergreens*, 47 N. Y. 216.

The opinion of the court was delivered by

SCOTT, J.—This proceeding was commenced in July, 1890, by petition under §§ 2473 to 2476, inclusive, of the Code of 1881, before a justice of the peace of Spokane county, by the appellees, who were residents of the city of Spokane Falls, to obtain damages from appellant for its appropriating a certain street, or a portion thereof, in said city for the purpose of laying its railroad track thereon, said street adjoining certain land within said city, of appellees, which was claimed to have been damaged thereby. Section 11 of the charter of Spokane Falls, to be found at page 304 of the Session Laws of 1885–86, empowered the city to authorize the locating of railroad tracks upon its streets, and contained a provision that any person or corporation laying down such railway should be liable to the owners of property abutting on such street for all damages or injury caused thereby, to be ascertained on petition of the property owner or owners in the manner provided by the sections of the code aforesaid. An act of the legislature approved February 1, 1888 (see Session Laws 1887–88, p. 58), provided a general and complete method of ascertaining and obtaining damages in consequence of the appropriation of land or other property by corporations for railway or other purposes, and required the proceeding therefor to be instituted in the district court of the district wherein the land was situated, or before the judge thereof, and purported to make the same exclusive of all other remedies, but did not refer expressly to the special provisions of said, or any other, city's charter.

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May, 1891.]

Opinion of the Court—SCOTT, J.

Appellant appeared before the justice of the peace, and objected to his jurisdiction in the premises, claiming that the proceedings must be had in accordance with the provisions of the latter act, which objection was overruled. Appellees contend that the sections of the code aforesaid were, in effect, adopted in the city charter by the reference thereto in the provision of § 11, and, inasmuch as the last act did not expressly refer to said provision, that the same, and said code sections, are still in force as to such matters arising in said city, and cite several authorities bearing more or less upon the proposition, and supporting their contention.

As a rule, it will not be held that a special act is repealed by implication by a general one upon the same subject. The intention of the legislature, however, in enacting the several laws, is what is to be arrived at; and, if it sufficiently appears that it was intended that a subsequent general law should supersede all prior legislation upon the same subject, general or special, though not expressly so stated, effect should be given to such purpose. It was at first, and for quite a long time, customary, in our territorial legislation, to grant special charters to different cities with widely varying provisions, both in respect to each other and to the general laws of the state. Later, such a course, as is usually the case, was found to be unsatisfactory, and there was a tendency to enact general laws to supplant such special provisions, which were becoming recognized as contrary to public policy. This general sentiment has subsequently found further expression by the limitation in our state constitution preventing the legislature from granting corporate powers or privileges by special acts, and prohibiting special legislation in many other instances. The said sections of the code, while in force, prescribed the general law of the state upon that subject. The legislature, by referring to them in the pro-

vision of § 11 of the charter of the city of Spokane Falls, showed an intention to provide the same particular remedy for residents of that city as existed there and elsewhere in the state in cases where land was taken for railway purposes, being the remedy provided by the code upon the same general subject. The later general law in force when this proceeding was instituted provided a remedy in all cases for the taking of land, or injuriously affecting it, for such purposes. Under it, proceedings could have been commenced before the district court or its judge for lands so taken or damaged within the limits of said city. There is no reason why the additional remedy should exist in said city of proceeding before a justice of the peace according to the sections of the code formerly generally in force. It is contrary to public policy that the special law should continue, the general law affording a complete remedy; and, in view of all the circumstances, we must hold that the act of 1887-88 was intended to supplant or repeal the special provision relating to the remedy or procedure in such cases, and that the justice of the peace had no jurisdiction in the premises. As to the effect of general acts upon special ones, see 1 Dill. Mun. Corp. (4th ed.), § 87; Endlich, Interp. St., § 230, and authorities there cited.

Judgment reversed.

ANDERS, C. J., and DUNBAR, HOYT, and STILES, JJ.,  
concur.

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May, 1891.] Opinion of the Court — STILES, J.

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[No. 150. Decided May 28, 1891.]

J. S. COX v. I. R. DAWSON.

ATTACHMENT—CLAIM NOT DUE—FRAUD MUST BE PROVED.

Under the statute (Laws 1885-6, p. 39, § 3) allowing attachment upon claims not yet due, when the debtor has fraudulently disposed of his property, the plaintiff must allege such fraudulent disposition in his complaint, and, in case of denial, prove the same upon the trial, in order to authorize a judgment in his favor.

*Appeal from Superior Court, Walla Walla County.*

Action in attachment by Dawson against Cox. The eleventh and twelfth counts of the complaint alleged that defendant executed to plaintiff's assignor certain notes, which were not due, but that nothing but time was wanting to fix an absolute indebtedness thereon, and that defendant had disposed of his property with intent to defraud his creditors. The answer denied that defendant had so disposed of his property. No evidence was offered in support of this allegation of fraud, and the court rendered judgment for the amount of the notes. Defendant appeals.

*Brents & Clark, and A. E. Isham, for appellant.*

*Cox, Teal & Minor, and B. L. & J. L. Sharpstein, for appellee.*

The opinion of the court was delivered by

STILES, J.—We find no material error in the record, under any of the points urged, excepting the seventh. The fifteenth paragraph of the answer raised no issue; so that all of the amounts claimed stood confessed. The admission of the letter and the statement of indebtedness, if erroneous, was not materially so, as the assignments to Dawson were otherwise sufficiently proven. But the court erred in submitting the eleventh and twelfth causes of action to the jury.

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The appellee, as owner and holder of two promissory notes which were not yet due, sought to include them in his suit against Cox upon his other ten causes, and to secure them by his attachment, in pursuance of § 3 of the act of February 3, 1886. (Laws 1885-6, p. 39.) He alleged fraudulent disposition of property in his complaint, and also in his affidavit for the attachment; but upon the trial he offered no proof of this allegation, and treated it as no longer material. The court took the same view, and rendered judgment for the amount of these notes, although the answer fully denies the fraud. The act referred to does not confer upon a creditor any new right of action, when it permits an attachment to secure an undue claim. Its effect is to make it the law of all contracts for future payment that, in case of conduct on the part of the debtor such as would tend to fraudulently jeopardize the safety of the debt, the creditor may commence his suit forthwith, and have an attachment as security *pendente lite*. By the first section of the act, attachments are issued only at the time of the commencement of the action, or afterwards. An action is commenced by the filing of a complaint and the issuance of a summons. Laws 1887-8, p. 24. In such cases, therefore, the attachment must be preceded by the filing of the complaint. But, unless the complaint shows the reason for its premature filing, it would be obnoxious to demurrer for want of facts. Therefore, the allegations in the affidavit for the attachment are necessary to the complaint also, and they continue to be material allegations at every stage of the case. They must be proved like any other fact to authorize judgment, as, unless they were true at the time the action was commenced, there was no jurisdiction for the premature suit and attachment, and the proceeding must fail. The judgment will be modified by deducting the amount of the six-months note of Honeyman, De Hart & Co. (\$450), with interest thereon from October

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Syllabus.

24, 1889, to May 3, 1890; and by the amount of the note of Walter Bros. (\$500), with interest thereon from December 5, 1889, to May 3, 1890, at 8 per cent. per annum; and by whatever sums may have been allowed by the court as costs or attorney's fees on account of said notes. When so modified, the remainder of the judgment will be affirmed. The cause is remanded to the superior court for modification in accordance with this opinion. Each party will pay his own costs of this appeal.

SCOTT, DUNBAR, and HOYT, JJ., concur.

ANDERS, C. J., not sitting.

[No. 143. Decided May 29, 1891.]

NORTHERN PACIFIC RAILROAD COMPANY v. MORTON R.  
HESS AND KATE HESS.

RAILROADS—ACCIDENTS TO PASSENGERS—NEGLIGENCE—INSTRUCTIONS—PLEADING.

In an action by a passenger for injuries received from the falling of an upper berth in a "free emigrant car" while she was away from her seat warming herself at the stove, it is not necessary for her to plead and prove the necessity for leaving her seat, as contributory negligence is a matter for the defense to establish.

Where plaintiff testified she thought it was a brakeman who raised the berth which afterward fell and crushed her fingers, and letters written by her to the company soon after the accident were put in evidence, in one of which she said she was injured through the negligence of an employé of the company, and in another she stated that it was a newsboy who raised the berth, there was sufficient evidence to sustain a verdict for plaintiff, as the jury might have believed from her testimony that it was a brakeman who negligently raised the berth. (STILES, J., and ANDERS, C. J., dissent.)

Although an instruction, standing alone, may be erroneous, yet it cannot be complained of, if the instructions, taken as a whole, fairly state the law applicable to the facts.

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Where the complaint contains an allegation that plaintiff has been compelled to pay a certain sum for medical treatment and nursing, evidence thereof is admissible, without being pleaded as a distinct cause of action.

*Appeal from Superior Court, Lincoln County.*

The facts are fully stated in the opinion.

*Mitchell, Ashton & Chapman*, and *N. T. Caton*, for appellant.

There appears no allegation in the complaint of a necessity or excuse for plaintiff, Kate Hess, leaving her seat. This is a material allegation, and testimony on that point, in the absence of such allegation, is clearly inadmissible. *Tucker v. Parks*, 7 Col. 62; *Mayor v. Cunliff*, 2 N. Y. 165. The matters of pain, sickness, medical services, medicines, nursing, etc., without regard to exact value, amount or extent, are matters that may be considered by a jury in arriving at a verdict where the demand is for damages generally, but when special damages are claimed by the proof, it must be in a case where amount or value is specifically alleged in the complaint. We take the true rule to be this: When damages which are the natural consequences of an act are sought to be recovered they must be specially alleged in the complaint. *Low v. Archer*, 12 N. Y. 277; *Taylor v. Monroe*, 43 Conn. 36; *Rice v. Coolidge*, 121 Mass. 393 (23 Am. Rep. 279); *Nunan v. City of San Francisco*, 38 Cal. 689; *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201; *Jesse v. Shuck*, (Ky.) 12 S. W. Rep. 304; *Street Ry. Co. v. Ware*, 84 Ky. 267 (1 S. W. Rep. 495). And this is so for the reason that defendant has a right to prepare himself with proof to rebut plaintiff's proof as to the amount and extent of such damages. *Shaw v. Hoffman*, 21 Mich. 151.

*Blevins & Neal*, and *H. J. Snively*, for appellees.

Contributory negligence is a matter of defense. *Louisville, etc., Canal Co. v. Murphy*, 9 Bush, 522; *Paducah,*

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May, 1891.] Opinion of the Court—SCOTT, J.

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*etc.*, *R. R. Co. v. Hoehl*, 12 Bush, 41; *Hackford v. Railroad Co.*, 6 Lans. 381; *Railroad Co. v. Pointer*, 14 Kan. 37; *Robinson v. Railroad Co.*, 48 Cal. 409; *Railroad Co. v. Gladmon*, 15 Wall. 401; *Urquhart v. Ogdensburg*, 23 Hun, 75; *Lopez v. Mining Co.*, 1 Ariz. 464; *Hocum v. Weitherrick*, 22 Minn. 152; *Conroy v. Oregon Construction Co.*, 5 West Coast Rep. 773. The cost of medicine, medical treatment, nursing, and all reasonable expenses incurred by the plaintiff by reason of the injuries complained of, are recoverable under a general allegation of damages. *Chicago, etc., R. R. Co. v. Wilson*, 63 Ill. 167; *Sheehan v. Edgar*, 58 N. Y. 631; *Goodno v. Oshkosh*, 28 Wis. 300; *Folsom v. Underhill*, 36 Vt. 581; *Klein v. Thompson*, 19 Ohio St. 569. It is the duty of carriers of passengers for hire to exercise extraordinary care and caution, foresight and skill to preserve the safety of passengers—to equip its cars with safe and sufficient seats, berths and appliances. *Moore v. Des Moines, etc., Ry. Co.*, 69 Iowa, 491 (30 N. W. Rep. 51, and note at p. 53); *Sales v. Western Stage Co.*, 4 Iowa, 547; *Bonce v. Dubuque St. Ry. Co.*, 53 Iowa, 278 (36 Am. Rep. 221); *Raymond v. Burlington, etc., Ry. Co.*, 65 Iowa 152 (21 N. W. Rep. 495); *Fay v. Davidson*, 13 Minn. 523; *Stokes v. Saltonstall*, 13 Pet. 181; *Louisville, etc., Co. v. Thompson*, 107 Ind. 442 (57 Am. Rep. 120; 8 N. E. Rep. 18); *Railroad Co. v. Herbert*, 116 U. S. 651; *Treadwell v. Whittier*, 80 Cal. 574 (13 Am. St. Rep. 175; 22 Pac. Rep. 266); *Steamboat New World v. King*, 16 How. 469. The falling of a berth in a sleeping-car is *prima facie* negligence. *Railroad Co. v. Walrath*, 38 Ohio St. 461 (43 Am. Rep. 433).

The opinion of the court was delivered by

SCOTT, J.—Appellee was a passenger from St. Paul to Sprague on one of appellant's cars, which was one of a class known as "free emigrant cars;" and during the passage she was injured by the falling of an upper berth while away from her seat, and standing by the stove. Just before she

left her seat at that particular time, some person passed through the car and raised the upper berth nearest to the stove, but did not push it up far enough so that the fastenings caught or locked. The berth might remain in such a position temporarily, but would be in constant danger of falling. The fastenings of such berths were so arranged as to be further secured by locking with a padlock. As to whether it was customary to keep them so locked when raised, was not shown, but this one was not locked in this way at the time. The conductor testified, however, that if the berth had been pushed up high enough for the fastening to catch it could not have fallen. Appellee testified that she left her seat and went to the stove, and that while standing there the train started, giving a quick jerk; that she put out her hand and caught hold of the post by one of the berths, when the upper berth came down and caught two of her fingers and crushed them; that the injury caused her a great deal of pain, and one of the fingers was in danger of remaining permanently stiff; and that she thought her medicine and nurse bill would amount to \$200. On cross-examination she testified that she thought it was a brakeman who pushed up the berth. The testimony of the physician who treated her was introduced. He said that her forefinger might remain permanently stiffened as an effect of the injury.

Appellant contends that appellee had no right to leave her seat unless there was a necessity for so doing, and that such necessity should have been pleaded in her complaint and supported by proof, and that without such an allegation any proof thereof was inadmissible. Appellee testified that she went to the stove for the purpose of getting warm. This testimony was objected to by appellant upon the ground aforesaid, that there was no allegation thereof in the complaint, which objection was overruled. This point was subsequently again raised by a request to charge, submitted by appellant, that "the seats constructed in the



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cars used in the operation and running of trains by defendant railroad company are constructed for the convenience of passengers, and by such passengers to be occupied while the train is moving, and not to be left or deserted while the train is in motion except where a necessity therefor arises, and if an injury occurred to any passenger after having left his or her seat which would not have occurred had such passenger remained in his or her seat the railroad company would not be liable except when a necessity arose for leaving the seat, which necessity should have been pleaded and sustained by evidence." This instruction was refused by the court, and rightfully so. Of course, if the plaintiff's proof had shown that she was guilty of any negligent act which contributed to the injury, she could not recover unless the defendant, with knowledge of the situation, could, by reasonable care and diligence, have prevented the accident. Her leaving her seat as she did, according to her testimony, was not negligence upon her part under the circumstances; and she was not bound to show, in making her case, that she was not guilty of contributory negligence. This was a matter for the defense to establish, if it was relied upon, and consequently there was no necessity for an allegation in the complaint of the kind contended for, and the proof of the plaintiff as to why she left her seat was incidental and immaterial. As to the burden of proof being upon the defense to show contributory negligence, see *Hocum v. Weitherick*, 22 Minn. 152; *Paducah, etc., R. R. Co., v. Hoehl*, 12 Bush, 41; *Railroad Co. v. Gladmon*, 15 Wall. 401; *Railway Co. v. Pointer*, 14 Kan. 37. We are aware that there is a conflict of authority upon this point, but deem the above rule the better one, after an examination of many authorities thereon *pro* and *con* submitted to us.

Appellant further contends that the following instruction given to the jury is erroneous, to wit: "You are instructed that if you find from the evidence that the bunk

in question was so arranged that it might be raised up, and when so raised would so remain temporarily without being fully locked, and when so raised was in a dangerous condition, and was so at the time plaintiff was injured, and the injury was caused thereby, you may from this find negligence upon the part of defendant,"—because it does not contain the further requirement that the berth must have been so raised by an employé of the company, or by the direction of one of its agents or employés, in order to make it liable, unless by due care and diligence it could have known of its unsafe situation had it been raised by another party. Standing alone, this instruction may be faulty in the particular claimed, but from the whole charge we do not think that the court intended to eliminate that condition from the elements of liability, or that the jury could have so understood it, for the court elsewhere in its instructions expressly told the jury that the mere occurrence of the accident did not raise a presumption of negligence on the part of the railroad company; that it must appear that the injury was the result of negligence on the part of the defendant, its agents or employés; and that if the berth, the falling of which caused the injury, was loosened or negligently pushed up by some person not in the employ of the company, that it would not be liable, and said further that the defendant was bound to exercise the highest degree of care and skill to preserve the safety of the passenger.

Taken as a whole, these instructions were as favorable to the defendant as it could ask, and there was no error therein that it could complain of, either as to the point above mentioned or as to the degree of care required. It is a fundamental principle of the law pertaining to passenger carriers that those thus engaged are under an obligation, arising out of the nature of their employment, and on grounds of public policy, to provide for the safety of

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passengers whom they have assumed for hire to carry from one place to another. Public policy and safety require that they be held to the greatest care and diligence in order that the personal safety of passengers be not left to chance or the negligence of careless agents; that, although the carrier does not warrant the safety of passengers against all events, yet his undertaking and liability as to them go to the extent that he, or his agents where he acts by agents, shall, so far as human care and foresight can go, transport them safely, and observe the utmost caution characteristic of careful, prudent men; that he is responsible for injuries received by passengers in the course of transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, and this caution and vigilance must necessarily be extended to all agencies or means employed by the carrier in the transportation of passengers.

It was claimed that no one was appointed to look after cars of this class, and for this reason a less rate of fare was charged upon them than upon other passenger cars; that this fact was generally known, and was understood by plaintiff at the time she bought her ticket; and that she selected this class of cars from choice by reason of the cheapness of the fare. But this would not excuse the company from liability for any negligence imputable to it, and it was a part of its duty to use due care to see that the berths were properly secured, and that the passengers therein were reasonably protected from injury.

It was further contended by the company that it would not be liable unless the injury in question resulted from the carelessness or negligence of one of its agents or servants in raising the berth, and that the proof showed that it was raised by a newsboy; that, although the appellee testified upon cross-examination that she thought it was a brakeman who raised it, she also testified that she would have

known better soon after the accident occurred as to who did it than she would at the later time of the trial. Certain exhibits were offered in evidence by the defendant below, being letters written by appellee to the superintendent of the company, in one of which she stated she was injured by the carelessness of one of the company's employés, which was written a short time after the injury. A few days later she wrote another letter, stating therein that it was a newsboy who pushed up the berth. Appellant contends that this testimony showed clearly that it was a newsboy who raised the berth, and that there was no evidence that it was raised by an employé of the company, and consequently the company would not be liable, there being no evidence to sustain the claim that the injury resulted by reason of the neglect of an agent of the company. We think, however, that there was sufficient evidence in this particular to sustain the verdict. The jury might have believed the testimony of the plaintiff wherein she stated that it was a brakeman who raised the berth. No proof was introduced as to the duties of a newsboy or brakeman in this particular. The plaintiff did state in one of her letters to the superintendent of the company that the act was performed by an employé of the company, and a few days later she stated that it was a newsboy who raised the berth. This, also, was some evidence that it was an employé of the company who performed the act.

It was claimed in the argument of the cause here that the damages allowed were excessive; that the injury could not have been serious, as the appellee was able to write with the injured hand soon after the accident. But this point was waived in consequence of its not being saved or raised in appellant's brief. There was no proof, however, as to which hand was injured, or that she used the injured hand in writing the letters aforesaid.

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Dissenting Opinion — STILES, J.

It was further argued that the evidence of the amount incurred for medical treatment and nursing was inadmissible under the pleading; that it was in the nature of special damage, and should have been specially pleaded. Appellant moved to strike this testimony, but the record does not show that any ground was stated for the motion. The court denied it. The evidence was admissible, as the complaint did contain an allegation that the plaintiff had been compelled to expend \$150 for medical treatment and nursing. It was not necessary that it should have been separately pleaded as a distinct cause of action, but, unless an amendment was asked and permitted, the amount of the recovery therefor should have been limited to the sum claimed in the complaint. But the appellant did not ask to have this done, either by a ruling of the court at the time, or by requesting an instruction to that effect to the jury; and no point over it of which this court can take notice was raised. The charge does seem to have been exorbitant, and no special circumstances appear to account for it; but the matter was not inquired into upon cross-examination, nor was the amount claimed to have been incurred disputed or questioned in any way except by the motion, as stated, nor do we know what the jury in fact allowed therefor. None of the points claimed by appellant are well taken, and the judgment is affirmed.

HOYT and DUNBAR, JJ., concur.

STILES, J. (*dissenting*). — The car in which the plaintiff was injured was one of a peculiar, cheap class, run for the accommodation of persons who did not wish to pay the usual first-class passenger rates; and it was understood that passengers traveling in it were to serve themselves, at least so far as taking care of the sleeping berths provided were concerned. It was not the duty of any railroad employé either to raise, lower or secure the berths. Therefore, the

fact that the berth in question fell carries with it no presumption that any agent of the company was the cause of its falling, in the absence of any showing that its construction was faulty. Therefore, I dissent from the opinion of the majority of the court in this case, because it seems to me that, considering the instructions of the lower court as on the whole harmonious, and therefore not objectionable in those parts wherein it instructed the jury as to the facts necessary to constitute negligence towards the defendant, the jury by their findings seem to have entirely disregarded the charge, and to have rendered a verdict not justified under its instructions. The testimony was not brought up to this court, but the evidence is here in the form of a narrative statement of facts. This statement shows very clearly that the plaintiff below, shortly after the accident to her, wrote a letter to an agent of the railroad company, and complained that she had been injured by the negligence of one of the company's employes. The agent to whom she wrote immediately requested further particulars. Whereupon she replied, stating the manner of her injury, and that it was a newsboy who had raised the berth, and left it either not fastened at all, or insufficiently fastened. Upon the trial she did not state with any degree of positiveness, or to the best of her knowledge and belief, that it was a brakeman who so insufficiently raised the berth, but simply that she thought so; and, upon her attention being called to the letter she had written in which she stated that it was a newsboy, she admitted having written the letter, and stated that her recollection as to who it was that raised the berth would probably have been better when she wrote the letter than at the time she was testifying. This, it seems to me, left the matter substantially as though the plaintiff had not testified at all on the subject. When she wrote the letter, she had no definite knowledge, and she stated nothing which could have warranted the jury in supposing

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that she had been better informed since; and, therefore, her testimony as to the person whose act indirectly caused the accident was entirely worthless. In such case, under the charge of the court, it was for the plaintiff to make out with reasonable certainty, by a preponderance of the evidence, that it was an agent of the company whose negligent act caused her injury. This she failed to do, and I think the court should have set aside the verdict upon that ground. This court, in its opinion, says that the jury might have believed the testimony of the plaintiff wherein she stated it was a brakeman who raised the berth. If she had stated that, perhaps the jury might have been warranted in doing so, but she did not so state. She simply stated she thought so, which, in the presence of her earlier—and, as she admitted, better—statement, carried no force with it. The jury had no right to disregard her admittedly better statement, and base their verdict upon the inferior one. The court charged the jury over and over again that if the berth, the falling of which caused the injury complained of, was loosened or negligently pushed up by some person not an employé of the defendant, and over whom the defendant had no authority or control, then, in that case, the plaintiff had failed to establish her allegation; and it also charged that a news agent was not an employé of the railroad company, or a passenger thereof, and that if it appeared from the evidence that the berth was pushed up by a news agent at his own motion, or at the request of some person not in the employ of the defendant, then their verdict should be for defendant. When a jury thus disregards the law as given to it by the court, the latter should instantly set its verdict aside.

ANDERS, C. J., concurs.

[No. 466. Decided June 2, 1891.]

J. GARDNER KENYON v. ROBERT KNIPE, RICHARD  
HOLYOKE, CHARLES CRAIG, *et al.*

## ESTOPPEL—RECORDED PLAT—TIDE LAND LOTS.

Where one purchases lots according to a recorded map or plat thereof, which are partly upland and partly tide land, with an alley and other lots platted over tide water in front of them, the purchaser is estopped from claiming any rights beyond the platted boundaries of his lots, as against the rights of the public in said alley, and of those in possession of the lots beyond such alley. (STILES, J., dissents.)

*Appeal from District Court, King County.*

Injunction by J. Gardner Kenyon against Robert Knipe, Richard Holyoke, Charles Craig, William Battia, Charles Brash, and Frank McCombs. Judgment for defendants, and plaintiff appeals.

*J. G. Kenyon, pro se, J. B. Howe, D. O. Finch, and E. C. Hughes, for appellant.*

The title of A. A. Denny extended only to high water mark of the waters of Elliott Bay, and his attempt to plat lots, blocks, streets and alleys below that line was a nullity, and no one could acquire any right by such void act. *Lake Superior Land Co. v. Emerson*, 38 Minn. 406 (8 Am. St. Rep. 679; 38 N. W. Rep. 200); *Pollard v. Hagan*, 3 How. 212-222; *Transportation Co. v. Brunswick*, 31 Minn. 297 (47 Am. Rep. 789; 17 N. W. Rep. 626); *Shively v. Parker*, 9 Or. 505; *Cleveland v. Choate*, 77 Cal. 73 (18 Pac. Rep. 875). Appellant is not estopped by said attempted platting of the sea by Denny from claiming, as owner of bank lots, all the riparian rights incident to such bank lots. *Hanford v. St. Paul, etc., Co.*, 43 Minn. 104 (42 N. W. Rep. 596); *Lyon v. Fishmongers' Co.*, 1 App. Cases, 662; *Welles v. Bailey*, 55 Conn. 292 (3 Am. St. Rep. 48; 10 Atl. Rep. 565).

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*Thomas Burke*, and *C. H. Hanford* (*Andrew Woods*, of counsel), for appellees.

The effect of surveying and platting of land by the owner into lots, defining streets, alleys, etc., and the sale of lots under such plot, is equivalent to an immediate and irrevocable dedication to public use of all streets and alleys, binding upon vendor and vendee. 2 Dill. Mun. Corp. (2d ed.), § 640, and cases cited; *Peck v. Providence Steam Engine Co.*, 8 R. I. 353; *People v. Lambier*, 5 Denio, 19 (47 Am. Dec. 273). The plat must be considered a part of the deed. 3 Washb. Real Prop. (4th ed.), pp. 428, 429, §§ 54, 55; Gould on Waters, p. 343. The rule of law is, that when lands are purchased and conveyed in accordance with a plat, the purchaser will be restricted to the boundaries as shown by the plat. *Trustees v. Schroll*, 120 Ill. 509 (60 Am. Rep. 275; 12 N. E. Rep. 246); *McCormick v. Huse*, 78 Ill. 363; *Miller v. Mendenhall*, 43 Minn. 95 (19 Am. St. Rep. 219; 44 N. W. Rep. 1141).

The opinion of the court was delivered by

HOYT, J. — The discussion in this case has extended over a broad range. Nearly every question connected with the subject of tide or shore lands, and the rights of riparian or littoral proprietors thereto, has been ably briefed and argued by counsel for the respective parties. Also the questions growing out of the making and recording of town plats, and the effect of the same, have been likewise presented. The conclusions to which we have come as to this second matter will make it unnecessary for us to decide the questions presented by the former, and, as they have been lately considered by this court in cases where a decision thereof was necessary, we shall here say nothing in regard thereto.

The facts, so far as they are necessary to the decision of this case, are substantially as follows: Arthur A. Denny

made and recorded his plat of an addition to the city of Seattle, upon which certain lots, streets and alleys appeared and were sufficiently described to show the intention of the maker of the plat in regard thereto. It nowhere appeared upon such plat where the line of ordinary high tide was. On the contrary, so far as could be gathered therefrom, all the territory covered by said plat was upland. As a matter of fact, however, the line of ordinary high tide so crossed said plat that a portion of lots 6 and 7, hereinafter mentioned, were above the line of ordinary high tide, and the remainder of such lots, and all of lots 5 and 8, together with the alley dividing the same, were below such line. After the making and recording of said plat the said Denny sold and conveyed to plaintiff herein lots 6 and 7 in block B of said plat, after which said Denny sold and conveyed lots 5 and 8 in said block, and said defendants, by mesne conveyances, became possessed of the title thereby conveyed. Under said last named conveyance from Denny, possession was taken and improvements made on said lots 5 and 8, and the alley dividing those lots from the lots of plaintiff was planked over and used as a street several years before the commencement of this action.

Under these circumstances we do not think it lies in the mouth of the plaintiff to object to such improvements as being an infringement upon his rights as a littoral proprietor. The effect of the plat made by Mr. Denny was to separate the tract thereby covered into distinct lots having definite, ascertained boundaries, and into streets and alleys as marked upon said plat, and to vest in the public such streets and alleys for the purposes therein designated. That such would be the effect as to such streets and alleys if the territory covered was upland, and owned by said Denny, is conceded, but it is contended that, as he had no title to the land below the line of ordinary high tide, his plat, so far as it purported to cover such lands, was absolutely void for

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any and every purpose. With this contention we cannot agree so far as Mr. Denny himself is concerned. It is perhaps true that as to anybody having rights adverse to him such would be the effect, but it does not lie in his mouth to say that that which he has made of record is a nullity. He is estopped by the making of such plat from alleging its invalidity, and so far as he is concerned would not be heard to complain of the use by the public of the territory covered by streets and alleys, especially after the same had been taken possession of and improvements thereon made. This being the condition of Mr. Denny, and his relation to the title of the lots bounded and described in said plat, we think that one purchasing lots from him, by reference to said plat, could acquire no better title than he had. Of course, if one could acquire title independent of, or adverse to, that represented by Mr. Denny at the time of the making of the plat, this reasoning would not obtain as to him; but such is not the condition of plaintiff. Whatever title he has he obtained from Mr. Denny, and we think it elementary that, under the circumstances of this case, he could get no better title than that of his grantor. A deed conveying property by reference to a plat or map thereof, adopts such plat or map as a part of such deed, and one purchasing thereunder becomes bound by the boundaries of the lot purchased as they appear on said plat or map. Applying this rule to the case at bar, it will be seen that the plaintiff herein did not purchase lots bounded by tide water, but those bounded by a definite and defined line one hundred and twenty feet from the front of said lots, so that the lots he purchased were bounded and concluded on the one side by Front street, and on the other side by the alley next westerly thereof, and we think he is estopped by such fact from claiming any rights beyond such boundaries as against the rights of the public in said alley, and of those in possession of the lots beyond such alley. Unaided by

such plat, his deed is uncertain and void. Aided by it, it becomes a valid deed, but of a lot with definite boundaries, and he must be bound thereby. It follows that the plaintiff is not entitled to the relief prayed for, and the decision of the lower court in so holding must be affirmed, and it is so ordered.

DUNBAR and SCOTT, JJ., concur.

ANDERS, C. J., concurs in the result.

STILES, J. (*dissenting*).—Both parties in this case assumed that the riparian right of wharfage existed when the action was commenced. Substantially their only difference on that subject was that the appellant took the position that such rights were not severable from the ownership of the upland excepting by a conveyance clearly showing that to be the purpose of the grantor. The appellee, on the other hand, claimed that any deed describing upland, or upland and shore land, by metes and bounds, though the high water mark in either case should be the actual boundary, was sufficient for the severance of the right of wharfage and access to the sea from the upland. From the opinion of the court it does not appear clearly, as the fact was, that the land owned by Denny constituted a mere strip of some forty feet in width between Front street on the east and the line of mean high water mark on the west. This strip seems to have been a remnant left after the original plat of lands owned by Denny had been filed, and which he thereafter undertook to subdivide into lots. His plat was in the usual form, and had nothing upon it which indicated that there was any navigable water embraced within its limits. To the westward of the line of high water, and one hundred and twenty feet from Front street, he noted on his plat what appeared to be an open strip, but without any designation upon it that it was to be an alley, and to the westward of that other lots were

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noted and numbered the same as those which embraced the upland. Kenyon met Denny in Olympia before the former had ever seen the plat, and spoke to him about the purchase of some of his "water lots." Denny told him he would reserve him two. Afterwards, in pursuance of this conversation, Denny executed to Kenyon a conveyance of lots 6 and 7 in one of these platted blocks. Across these lots, from north to south, the meander line extended. It does not appear whether Kenyon had at any time seen Denny's plat. Kenyon went into possession of the two lots by his tenant, and erected upon the lots, and extending therefrom over the shore some sixty feet, a building on piles, and used the building thus erected to the time of the commencement of this suit. The appellee took from Denny a quit-claim deed of lots 5 and 8 on the same plat, which lots were immediately to the westward and in front of the lots of the appellant. The appellee thereafter (and just when is not discernible) extended southward from other lots in the same block which he had purchased from Denny in like manner, a wharf over the area of lots 5 and 8. This action was brought to abate what appellant conceived to be both a public and a private nuisance in front of his lots and of his building and premises.

I am unable to understand upon what principle, in the light of the decision of this court in the case of *Eisenbach v. Hatfield*, ante, p. 236, the position is now taken that the appellant's main contention was not a good one. In that case it was decided—*first*, that a riparian owner now has no rights whatever as against the state or its grantee or licensee beyond the boundary of his land; and, *secondly*, that the act of 1854 was merely a permissive license which is not available unless it had been taken advantage of by the shore owner before the adoption of the constitution. This ruling denies any claim that Denny might have had that he had any right whatever beyond his

shore line, excepting as a licensee, under the act of 1854. He took no advantage of that license, and had no title, interest or claim whatever in the waters or the soil beneath them beyond the line of his land at the time he filed his plat. His plat, therefore, was utterly void for every purpose as to all that part of it which extended beyond the upland; and now to say that, notwithstanding he was not the owner of any land beyond the water line, nevertheless he could, by the mere filing of a plat, exercise an authority which would not only dedicate a street or alley out in the water, but also reserve to himself a title or a right still farther in the water, which he could convey to a grantee by a quit-claim deed, is incomprehensible to me. It was not decided, nor do I think it was intended to be intimated, in the case of *Eisenbach v. Hatfield*, that the owner of upland who had availed himself of the act of 1854 by erecting a structure in the nature of a wharf from his land into the water could not prevent a mere stranger, such as was the appellee, who confessedly acquired no title whatever from Denny, from creating a nuisance in front of him towards the deep water. The effect of this decision is to say that Denny, by his mere plat, could set aside the act of 1854, and, while giving to Kenyon more than the act of 1854 contemplated up to the west line of his lots, could absolutely deprive him from going therefrom to the deep water. In a word, this court, having rejected all forms of riparian rights, now concedes to a shore owner prior to the constitution rights which have never been conceded to him outside of Rhode Island and Minnesota, where he is said to have substantially the whole title to deep water.

I think the court is entirely mistaken as to the effect of such a plat. Section 2328 and following sections of the code do not say who may make or file a plat of a town, but simply provide that whoever shall thereafter lay off any town shall, previous to the sale of any lots, record a

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plat, and that the effect of such a plat shall be to all intents and purposes the same as a quit-claim deed. Now, it is the first principle of platting, that the one who plats must be the owner in fee of the land platted. Says Angell on Highways (§ 132):

“Dedication is an appropriation of land to some public use, made by the owner of the fee.”

And in § 134:

“A primary condition of every valid dedication is that it shall be made by the owner of the fee.”

Herman on Estoppel (§ 1143) says:

“A primary condition of every valid dedication is that it shall be made by the owner of the fee or of an estate therein.”

In *Lee v. Lake*, 14 Mich. 12 (90 Am. Dec. 220), Judge COOLEY said:

“The plat put in evidence was made by Brooks and Crane at a time when they do not appear to have had any interest in the land, and if the execution [of the plat] had been in all respects in due form it could not have the effect which the statute gives to plats executed and acknowledged under its provisions. The statute then in force provided for the making, acknowledging and recording of town plats by the proprietors; and it is impossible to give the peculiar statutory effect of a present conveyance to a plat made by persons who at the time had no title to convey, even though they may afterwards have become the owners. And as the healing act of 1850 was confined in its scope to imperfect acknowledgments, it could not give effect to a plat which no acknowledgment could have made effectual at the time it was made.”

This decision was concurred in by Judges CHRISTIANCY and CAMPBELL. The case of *Hoole v. Attorney-General*, 22 Ala. 190, is considered a leading case upon this subject, and therein the court held not only that it must be the owner of the fee who could make a lawful dedication which the state even could take advantage of, but that if the land, at the time of the attempted dedication, was covered by a mort-

gage, that the mortgagor could not dedicate without the acquiescence of the mortgagee. In *Baugan v. Mann*, 59 Ill. 492, which was an injunction to prevent one who held title under Sprague, who, it was alleged, had dedicated an alley in the rear of appellee's premises, it was said:

"The evidence fails to show title in Sprague. Unless he owned the fee he could make no valid dedication to public use. A primary condition of every valid dedication is that it shall be made by the owner of the fee."

In *Porter v. Stone*, 51 Iowa, 373 (1 N. W. Rep. 601), the court said:

"The party who lays out a town site, the effect of which . . . is to donate to the public, streets, alleys, and public grounds, must of necessity have some title to the property to be affected by his act. A grant to the public is not established by simply showing that a town site has been laid out. The party claiming benefits from the grant must go further, and show the title of the party laying out the town, and thus undertaking to make the grant."

In *Leland v. City of Portland*, 2 Or. 46, where the question was whether a dedication of land in front of the city of Portland, between the Willamette river and the westerly side of the street, which was made before September 27, 1850, was of any validity, the court said:

"The next question presented is, did the court below err in refusing to instruct the jury that a dedication of the property in question, to be binding, and to divert the title from the donor to the public, must have been since the 27th of September, 1850? I regard this question as settled by the case of *Lownsdale v. Parrish*, 21 How. 290, which case arose on the question of the dedication of the levee in this same city of Portland, and by these same proprietors of the town site, and was governed by the same considerations in this respect as govern this case, where it was held that a dedication made prior to act of 27th of September, 1850, was void for want of any title in the donors at the time of dedication, the title then being in the United States."



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In England the rule has been the same, the leading case being *Wood v. Veal*, 5 Barn. & Ald. 454, where it was held that a tenant for ninety-nine years could make no dedication to the public, nor could any one else excepting the owner in fee. The latest case upon this subject, and one which is almost exactly the same as the case at bar, is that of *Ruge v. Oyster, etc., Co.*, 25 Fla. 656 (6 South. Rep. 489). It seems that the original plat of the city of Apalachicola, located on the bay of that name, showed an open space, which was denominated on the plat as "Florida Promenade," and it was contended by the owner of land in the neighborhood that the dedication of the promenade carried with it the right to the public to have the waters of the bay in front kept clear of all obstructions. The court said:

"The dedication of the promenade by the Apalachicola Land Company was made more than fifty years ago. What right had the company to make a dedication extending into the bay? Even if the promenade reached the bay, the company had no right in the submerged lands thereof, and could not dedicate these. Admitting that accretions to the soil of the promenade would become a part of it, that was a contingency which did not authorize the dedication of lands under the water in front of the promenade."

Denny's plat was good to the water's edge. Beyond that it was void. Even Denny himself was not estopped to say as much. In such cases there is no question of estoppel. The real question is, do the facts show a dedication, either statutory or common law? *Hayes v. Livingston*, 34 Mich. 384 (22 Am. Rep. 533). Having had absolutely no title, or shadow or claim of title, the maker of the plat was free to deny it at any time, and so could any of his grantees of the upland, although their deeds purported to convey something which had an existence. Perhaps, on the whole case, the judgment of the court is right, however, as there was evidence tending to show laches on the part of Kenyon in

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[2 Wash.]

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prosecuting his suit for injunction until the structures he complained of had been erected and used for a considerable period, and on this ground I can concur.

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[No. 539. Decided June 2, 1891.]

J. GARDNER KENYON v. WATSON C. SQUIRE.

*Error to District Court, King County.*

*J. Gardner Kenyon, pro se, D. O. Finch, and E. C. Hughes, for plaintiff in error.*

*J. C. Haines, and Thomas Burke (Andrew Woods, of counsel), for defendant in error.*

HOYT, J.—Although the facts of this case are somewhat different from those of the case of *Kenyon v. Knipe*, *ante*, p. 394 (just decided), yet under the law as therein announced the same conclusions must be reached, and the judgment of the court below affirmed, and it will be so ordered.

SCOTT and DUNBAR, JJ., concur.

ANDERS, C. J., concurs in the result.

STILES, J., dissents.

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June, 1891.]      Opinion of the Court—HOYT, J.

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[No. 540. Decided June 2, 1891.]

J. GARDNER KENYON v. WATSON C. SQUIRE AND J. R.  
WILLIAMSON.

*Error to District Court, King County.*

*J. Gardner Kenyon, pro se, D. O. Finch, and E. C. Hughes, for plaintiff in error.*

*J. C. Haines, and Thomas Burke (Andrew Woods, of counsel), for defendants in error.*

HOYT, J.—This case is governed by what we have said in the case last decided, and for the reasons therein stated the judgment must be affirmed.

SCOTT and DUNBAR, JJ., concur.

ANDERS, C. J., concurs in the result.

STILES, J., dissents.

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[No. 62. Decided June 2, 1891.]

GEORGE F. DEARBORN v. PETER MORAN AND ROBERT  
MORAN, *Copartners.*

*Appeal from Superior Court, King County.*

*Gale & Fay, for appellant.*

*J. C. Haines, for appellees.*

HOYT, J.—The court below, in deciding this case, gave the same effect to a town plat, part of which covered upland and part tide land, that we have given in the case of *Kenyon v. Knipe, ante*, p. 394 (just decided), and it fol-

lows that its decision must be affirmed, and it will be so ordered.

DUNBAR and SCOTT, JJ., concur.

ANDERS, C. J., concurs in the result.

STILES, J. (*dissenting*).—This case was commenced in September, 1889, before the constitution went into effect, and by his complaint the appellant showed that he was the owner in fee and in possession of certain property in Plummer's addition to the city of Seattle, and that his land extended to and upon the waters of Elliott Bay, a navigable arm of the sea. He further showed that defendants were driving piles and erecting other obstructions between him and the deep water. Other allegations made a good complaint, conceding that the defendants were mere trespassers without rights in themselves. A demurrer to the complaint was sustained, and judgment went against the appellant, from which judgment this appeal was taken. I am unable to see why, under the decision in the case of *Eisenbach v. Hatfield*, ante, p. 236, and that of *Kenyon v. Knipe*, ante, p. 394, the demurrer should not have been overruled, unless, as seems to be hinted at in the briefs on both sides, the court below looked beyond the record in the case, and considered that, inasmuch as the plaintiff's property was shown to be certain lots and blocks in the city at Seattle, there must be other lots, blocks and streets beyond him, covering part of the tide lands, and which were also embraced in Plummer's addition. This feature was not in the case, and was not disclosed by plaintiff's complaint. The suit having been commenced before the constitution became operative, and before any subsequent laws on the subject were passed, I think appellant was entitled to have some relief under the pleadings, even under the holdings of this court in the cases above mentioned. *Van Dolsen v. Mayor, etc.*, 17 Fed. Rep. 817.

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Opinion of the Court—HOYT, J.

[No. 190. Decided June 2, 1891.]

## J. B. KILROY v. D. A. MITCHELL.

## EQUITY—FINDINGS OF LAW AND FACT—MECHANICS' LIENS.

Although findings of fact and law are proper in a suit in equity, they are not essential to the validity of a judgment rendered therein.

A suit to foreclose a mechanic's lien cannot be transformed into an action at law by the defendant setting up a legal defense by way of counter-claim.

*Appeal from Superior Court, Pierce County.*

Suit by D. A. Mitchell against J. B. Kilroy to foreclose a mechanic's lien, to which the defendant interposed a counter-claim for damages. Judgment for plaintiff, and defendant appeals.

*Judson, Sharpstein & Sullivan*, for appellant.

*G. W. Van Fossen*, and *Parker & Williamson*, for appellee.

The opinion of the court was delivered by

HOYT, J.—The sole ground upon which it is sought to reverse the judgment entered in this cause in the court below is, that there were no findings of fact and law to support the same. That such findings are necessary in actions at law, when tried by the court without a jury, is clear from our statute, and has become the established law of this state. See *Bard v. Kleeb*, 1 Wash. 370 (25 Pac. Rep. 467), decided at the last session of this court. We think, however, that such findings, although orderly and proper in cases in equity, are not essential to the validity of the judgment. Judgments of law are founded upon general or special verdicts of juries, or findings of the court which take the place thereof. Without such verdicts or findings

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20*	805
36*	491

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2	407
40	3

there is nothing to support the judgment. Cases in equity stand upon a different basis. The decrees therein, while founded upon facts the same as in cases at law, are placed upon a broader basis than any technical determination of what has been proven by the testimony; such judgments really stand upon the entire evidence in the cause. It will thus be seen that the reasons for holding findings essential in a law case do not obtain in a cause in equity. Besides, on review in this court, a judgment at law will usually stand or fall upon the verdict or findings, without any reference to the evidence as a whole; while in equity it is the duty of this court to retry the cause, not upon verdicts or findings, but upon the testimony introduced in the court below. Section 451 of the Code of Washington is reasonable and proper, if held to apply only to suits in equity, and we think should be thus construed.

Appellant, seeing the force of the reasoning above suggested, sought to show that this action, though commenced as a suit in equity, was, by the action of the defendant in setting up a legal defense by way of counter-claim, transformed into a suit at law. We do not think that this view of the case is warranted. A court of equity, having once obtained jurisdiction of a cause, will retain it until final determination thereof. See *Installment, etc., Loan Co. v. Wentworth*, 1 Wash. 467 (25 Pac. Rep. 298), decided at last October session. It follows that findings of fact and law were not necessary to the jurisdiction of the court in rendering judgment in this cause, and that the judgment of the court below must be affirmed.

ANDERS, C. J., and DUNBAR, SCOTT and STILES, JJ.,  
concur.

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[No. 193. Decided June 4, 1891.]

THE OREGON RAILWAY AND NAVIGATION COMPANY V.  
JOHN EGLEY AND HATTIE EGLEY.

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RAILROADS — NEGLIGENCE — INJURIES TO CHILD — CONTRIBUTORY NEGLIGENCE.

Where a boy, nine and one-half years of age, is injured while stealing a ride upon the foot-board of a switch engine, the facts that he is of ordinary intelligence, familiar with the workings of a switch engine, and aware of the danger of his act, that he has frequently been forbidden by his parents from going upon the cars, and has been driven away from them by the employes of the railroad, are sufficient to establish contributory negligence on his part.

It is not negligence on the part of a railroad company for its employes to fail to ascertain that a boy of tender years is stealing a ride, unknown to them and out of their sight, on the back foot-board of a switch engine, when they have made a practice of preventing such acts by driving boys away when they saw them about the cars.

*Appeal from Superior Court, Walla Walla County.*

The facts are fully stated in the opinion of the court.

*W. W. Cotton, W. B. Gilbert, and C. B. Upton, for appellant.*

*Brents & Clark, for appellees.*

The opinion of the court was delivered by

DUNBAR, J.—The undisputed facts in this case are that Zene Egley, on the 3d day of May, 1889, was run over by the switch engine of the defendant, in the city of Walla Walla, and as the result thereof his right leg was so crushed that afterwards it was amputated about four inches below the knee joint. This action is brought by the plaintiffs against the defendant for the injury to the said Zene Egley, the child of the plaintiffs. The plaintiffs, as will be seen by reference to the pleadings, alleged that this injury was caused by the defendant in wrongfully inviting, inducing

and permitting said child to be and go upon the said engine, and thereafter carelessly running and operating the same while the child was thereon, exposed to great danger. The defendant in its answer denied these allegations, and set up the defense of contributory negligence. Other matters in relation to the ownership of the road were contested at the trial below, but were abandoned by the appellant here.

The fourth special finding of the jury was entirely unwarranted and unsupported by the testimony. In response to the question, "Did the said Zene Egley know that it was dangerous for him to ride upon the engine and freight cars of the railway mentioned in the complaint, in the manner in which it has been shown by the evidence he was doing at the time he was injured?" jury answer, "No." There is no evidence tending to prove this finding. The whole testimony shows that Zene Egley was a boy of ordinary understanding, capable of comprehending and acting upon what was told him. It appears from the testimony of all parties (including the testimony of the boy himself) that he had been warned time and time again, not only by his parents, but by the servants of the company and his associates, not to attempt to ride on the cars. His own father testified as follows:

"Well, I often told him not to ride upon the cars; not to go near them. I cautioned him in this respect."

It is not too much to say that the jury ought to have understood from the expression, "I cautioned him in this respect," that the witness meant to say or did say, in effect, "I warned him of the danger of riding on the cars." The boy himself testified that he was afraid he would get run over by the cars. On re-direct examination, commencing on page 82 of the transcript, the following testimony was given:

"Question by Mr. Brents: Zene, you stated yesterday that you knew it was dangerous to be on that back end of



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the tender. When did you first know that it was dangerous—when did you first find out that it was dangerous?

A. Before I got hurt—before.

“Q. Did you know it was dangerous before you got hurt? A. Yes.”

This was direct and positive testimony by the boy in answer to direct questions by his own attorney, and was not in any way affected by the leading and misleading examination which immediately followed, which was as follows:

“Q. Did you know it after you got hurt? A. Yes, sir.

“Q. You knew it by getting hurt. A. Yes, sir.

“Q. Was that the first thing that caused you to know that it was dangerous? A. Yes, sir.”

Cross-examination, which followed, was as follows:

“Q. Zene, didn't your father and mother tell you not to go upon the engine? A. Yes, sir.

“Q. Did they tell you why? A. Yes, sir.

“Q. When did they tell you not to get upon the engine? A. Before I got hurt.

“Q. Why did they tell you not to get upon the engine? A. Said I would get hurt.

“Q. Zene, have you ever been driven away from the cars at various times? A. Yes, sir.

“Q. Did the trainmen ever say anything to you? A. Yes, sir.

“Q. What did they say to you? A. Told me to get away.

“Q. Did they say they would do anything to you if you got on board? A. Yes, sir.

“Q. What did they say? A. Said they would punish me.

“Q. You knew it was dangerous to get on there, didn't you, before the accident? A. No, sir.

“Q. Hadn't you been told it was dangerous? A. No, sir.

“Q. Didn't your mother tell you it would hurt you? A. Yes, sir.

“Q. Didn’t your father tell you it would hurt you?  
A. Yes, sir.

“Q. Well, didn’t you know it would hurt you? A.  
Yes, sir.

“Q. And you knew this before the accident? A. Yes,  
sir.”

Thus it will be seen that while the boy testified that he did not know it was dangerous, it is evident that he did not definitely understand the meaning of the word “dangerous,” for he testified in the next breath that his father and mother told him it would hurt him, and that he knew it would hurt him. It is too evident for discussion that the testimony of the boy, outside of any other testimony, shows conclusively that he *did* know it was dangerous for him to ride upon the cars in the manner in which he was riding when he was hurt, and that there was no conflict of testimony on that subject worthy of the consideration of the jury; and while it is true that a case will not be taken from the jury when there is conflict of testimony, and that a court will not be justified in disturbing a verdict because its judgment may run counter to the judgment of the jury, or because the weight of testimony is, in the opinion of the court, opposed to the verdict, it is equally true that where there is no conflict of testimony on material points, and there is no testimony tending to establish a fact, the establishment of which is necessary to warrant a verdict, the court will not hesitate to interfere in the interests of justice, and reverse the judgment.

In this case it is shown by the testimony that Zene Egley was nine and a half years old. It is shown by the testimony, and not disputed, that he was a boy of ordinary intelligence and practical experience, and that he was familiar with the workings of railroads, and especially with the workings of the switch engine by which he was injured, and that he had discretion enough to know that the amusement on which he was insisting, was amusement fraught

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with danger, and that he was a trespasser on the railroad when he was stealing the rides. He may not have known the technical meaning of the word "trespass," but all the testimony, including his own, shows that he knew he had no right on the car; that not only had he been cautioned and forbidden by his parents to go upon the cars, but had been frequently driven away by the yard-master and other employés; and that they had threatened to punish him if he did not keep away; and shows that he knew he was a wrong-doer. See the following testimony:

"Q. Do you know the yard-master by sight? A. Yes, sir.

"Q. Had he ever driven you off the cars? A. Yes, sir.

"Q. How many times? A. I don't know.

"Q. How many do you think? A. About three times.

"Q. About how many? A. Three; not more than three, though may be more.

"Q. Well, how many more? A. I can't tell just how many times.

"Q. Well, how many do you think? A. About five or six.

"Q. When you were on a car, and you saw him coming, what did you do? A. Got down and run.

"Q. And you always did that, did you? A. Yes, sir.

"Q. What would he do if he happened to get near you? A. I don't know.

"Q. Did he ever tell you to stay off the cars? A. Yes, sir.

"Q. Didn't he always tell you to stay off the cars when he got close enough to speak to you? A. Yes, sir.

"Q. And every time he saw you he said that? A. Yes, sir."

Add this to the testimony of the father that he had cautioned the boy not to go on the cars, and that at one time he prevented him from doing so; and that of the yard-master, Mr. Gould, that he had at one time stopped the train and put him off; and, to use his own language, "in two or three cases I gave him to understand I would

give him a thrashing when I got close to him, and he would get off a distance and begin to swear and abuse me, and call me names, some of them, and after that they kept clear of me and watched me pretty close;" and it plainly appears, without any doubt whatever, that the boy was of a mind sufficiently discriminating to know that he was trespassing, and to be responsible for contributory negligence. Of course, I recognized the fact that a different gauge or measure must be used in ascertaining or determining the degree of guilty negligence to be imputed to a child, from that used in determining the degree of negligence to be imputed to an adult of ordinary intelligence. This is a distinction founded in justice, and the reasoning which sustains it cannot be gainsaid. Neither do I question the proposition, stated by counsel for the plaintiff, that since the law does not, in any case, exact an unreasonable or impossible thing from any one, the duty thus devolved upon each depends upon his powers of comprehension and performance; and the duty of a child, therefore, is proportionate to its mental and physical capacity. But, strictly applying the principles of that proposition to the facts of this case, as shown by undisputed testimony, the conclusion above is reached. The law, as laid down by Shearman and Redfield on the Law of Negligence (volume 1, § 73), is as follows:

"It is now settled by the overwhelming weight of authority that a child is held, so far as he is personally concerned, only to the exercise of such degree of care and discretion as is reasonably to be expected from children of his age. No injustice is done to the defendant by this limitation of the defense of contributory negligence, since the rule itself is not established primarily for his benefit, and he can never be made liable if he has not been himself in fault. Thus, where one is driving a horse with ordinary care, at a rate of speed suited to the locality, he is, of course, not liable for an injury by the horse to a child who suddenly throws itself in the way, and is run over before the driver

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can prevent it. So, if a child, proceeding in reckless haste, however natural to its age, should rush against a railroad car while in motion, the driver of the car or engineer of the train not seeing him, it is obvious that his act is the sole cause of his injury; and, even though he may be entirely free from blame, the most that can be said in his favor is, that the case is one of inevitable accident; and the owner of the car is no more responsible for his injury than would have been the owner of a wall against which the child had thoughtlessly struck himself."

The contributory negligence in this case being proven by undisputed testimony, the next question is, was there any negligence on the part of the railroad company which was the approximate cause of the injury? or, to state it negatively, could the injury have been prevented by any degree of care which the law imposed upon the railroad company? The testimony, in my judgment, shows no negligence at all on the part of the company. Whenever they saw boys about the cars, they immediately drove them off, and threatened to punish them. It appears from the testimony that the company had issued a bulletin not to allow boys on the track, and that its servants did all they could reasonably be called upon to do to carry out the instructions of the company in this respect; and it was well understood by the boys in that neighborhood generally, and by Zene especially, that they had no right to go into or about the cars. He slipped on the engine with a view of hiding himself from the engineer, and located himself on the foot-board at the back end of the engine, where the engineer could not see him while attending to his duties. It is not claimed that any employes of the company saw him there or had any knowledge of his whereabouts.

"Negligence," says Shearman and Redfield, "includes two questions: (1) Whether a particular act has been performed or omitted; and (2) whether the performance or omission of this act was a breach of a legal duty. The

first of these is a pure question of fact; the second is a pure question of law." § 52. As was said by the supreme court of Connecticut in the case of *Nolan v. Railroad Co.*, 53 Conn. 461 (4 Atl. Rep. 106):

"'Negligence' may be defined to be a failure to perform some act required by law, or the doing of the act in an improper manner. The law determines the duty; the evidence shows whether the duty was performed. The duty resting upon the defendant was a question of law; was the duty performed? was a question of fact."

These authorities, I think, fairly present the law, and the relative duties of the court and the jury, on this perplexing question. The theory of the plaintiff in this case is, that the company was negligent in not ascertaining that the boy was on the engine at the time of the accident, and this seems to be all the negligence attributed to it; and it is evident, from the special findings and the verdict, that this view was taken by the jury, and it becomes the duty of this court to announce that the omission of the act complained of does not constitute legal negligence. As wide a range as the decisions of courts have taken on this interesting subject, no court, to my knowledge, has gone so far as to hold that railroad companies are the absolute insurers of the life and limbs of boys who, against their express commands, insist upon trespassing upon their property; and to sustain this case would, in my opinion, go that far. The only way the company could prevent this would be to keep a sufficient number of guards to detect boys in their attempts to board the cars or engines. If the presence of the boy on the engine or cars had been brought to the knowledge of the operators of the engine, it is plain that their duty would have been to have protected him from harm, no matter how great his negligence might have been. The testimony shows that they did not see the boy on the engine, and did not know that he was there; for, by reason

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of his location on the foot-board of the engine, the engineer, in the performance of his ordinary duties, could not have seen him. The verdict is wholly unsustained by the evidence, and strictly, the defendant would probably be entitled to judgment on the third and fifth special findings; but, as the jury was evidently influenced both as to their general verdict and special findings by the instructions of the court, which in their general scope, and especially in the seventeenth instruction, went to the extent that the defendant should have exercised care in ascertaining whether or not Zene Egley was on said engine immediately preceding said injury, the judgment will be reversed, and the cause remanded to the lower court, with instructions to retry the case, and to modify the instructions in accordance with this opinion.

SCOTT, HOYT, and STILES, JJ., concur.

ANDERS, C. J., not sitting.

[No. 156. Decided June 8, 1891.]

SARAH A. WEBSTER v. DAVID H. WEBSTER.

DIVORCE—DIVISION OF PROPERTY.

In granting a divorce the court has power, under the statute of this state (Code 1881, § 2007), to make such division of the joint and separate property of husband or wife as shall, in its discretion, appear just and equitable.

*Appeal from Superior Court, King County.*

Suit for divorce by David H. Webster against Sarah A. Webster. Defendant answered and also filed a cross-complaint upon which a decree of divorce was rendered. The court made, among others, the following finding of facts:

“IV. That the following property, to wit: All of lot two and a strip three feet wide off of the north side of lot

2	417
8	443

2	417
8	8
26*	864
35*	359

2	417
10	118
110	123
26*	864
38*	1061
38*	1063

2	417
24	142
24	147

2	417
26	217

three in block seven, in Boren and Denny's addition to Seattle, is part and parcel of two lots originally purchased on or about the 24th day of July, 1869, at a time when the plaintiff and defendant were living together endeavoring to make a home, and providing for the future; that neither, at that time, had any money excepting that which was earned by the plaintiff in his daily vocation, excepting a small amount that the defendant, Sarah A. Webster, received from her half-brother; that whatever sums said defendant received from her brother, or otherwise acquired, were used and expended for the benefit of both in the household affairs; that the purchase money for said two lots was made by the plaintiff, and money of his own earning; that whatever improvements have been erected upon said lots, with the exception of the building known as the Webster building, were erected from money earned by plaintiff; that the Webster block has been erected from moneys received from a mortgage upon said realty; that at the time of making the final payment on said lots the deed was taken in the name of the defendant, Sarah A. Webster, but that the property was not deeded to her nor intended, nor was it understood at the time nor since, as a gift; that the property just referred to is of the value of \$25,000, which enhanced value is by reason of the increase in value of real estate, and not from any particular act of either one of these parties, excepting as far as the building erected thereon adds to that value, the money for the erection of which was received from a mortgage thereon; that since their marriage they have also acquired and are now the owners of lots five and six in block four, in Robinson's addition to the city of Seattle."

Upon which finding of fact the court made the following conclusion of law, to wit:

"That said real property should be divided equally, share and share alike, subject to the debts, which should be paid in the same way."

The defendant and cross-complainant, Sarah A. Webster, excepted to the findings of fact, and conclusions of law, and from the judgment thereon appeals to this court.



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June, 1891.]      Opinion of the Court—DUNBAR, J.

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*Richard Osborn, and Thompson, Edsen & Humphries, for appellant.*

*Jacobs & Jenner, and Ronald & Piles, for appellee.*

The opinion of the court was delivered by

DUNBAR, J.—The main question to be decided in this case involves the construction of § 2007 of the Code of Washington, which is as follows:

“SEC. 2007. In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody and support and education of the minor children of such marriage.”

This statute was passed in 1863, prior to the passage of the community property law, and has ever since been the law of the territory, and of the state. It is contended by appellant that this must be construed to mean that the court shall make such division of the joint property of the parties as shall appear just and equitable, and that the separate property of either spouse is not to be considered in making such disposition. We are unable to see how this construction can be sustained by any rule for the interpretation of statutes. The language of the statute seems to be plain and unambiguous, and the words must be given their ordinary meaning. The statute does not say that the court shall make such disposition “of their joint property,” etc., but shall make such disposition “of the property of the parties.” This language is comprehensive; it is an equitable division of the property rights of the parties that the court is authorized to make. One statute defines what separate property is, another what community property is,

and who shall have control of separate property, and who of real property, both separate and community; but these statutes relate to property rights during coverture. This statute, however, provides that when coverture is to be broken, and the marriage relations dissolved, that the parties shall bring into court all their property, and a complete showing must be made. Each party must lay down before the chancellor all that he or she has, and, after an examination into the whole case, he makes an equitable division. This view is strengthened, and it seems to me established beyond controversy by the succeeding provision of the section, "having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired." If the court has no jurisdiction over the separate property, and cannot take it into account in making the division, that portion of the statute which says it shall have regard to the party through whom the property was acquired, is meaningless. The law does not require an equal division of the property, but a "just and equitable" division, and as no general rule for a just and equitable division can be laid down, but each case must be adjusted according to its own merits and the particular circumstances surrounding it, the court investigates all the circumstances—(1) as to who is to blame, or, if neither party is blameless, the degree of blame to be attached to the respective parties; (2) who is the more proper party for the custody of the minor children, if any; (3) if there is a disposition of the property to be made, the manner in which it was acquired, whether derived principally from the husband or the wife, or by their joint exertions; the condition of the parties as to age and health, and a great many considerations which will necessarily enter into the discretion of the court in making the division. The separate property of the husband or the wife is simply a circum-

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June, 1891.]Opinion of the Court—DUNBAR, J.

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stance for the court to take into consideration in making the division.

This subject is now regulated very largely by statute, and there is great similarity in the statutes, all of them investing the court with large discretionary powers. In Iowa, under a statute substantially like ours, which provides that, "when a divorce is decreed, the court may make such order in respect to the children and property of the parties, and the maintenance of the wife, as shall be right and proper," it is held that, when a divorce is in favor of the wife, a part of the husband's lands may be set off to her to be held by her in fee simple. *Jolly v. Jolly*, 1 Iowa, 9. In Kentucky and Alabama, the courts have refused to divide the separate property of either spouse; but, in the statutes of each of those states which give the court substantially the same discretion that ours does, there is a special provision or saving clause, to the effect that "nothing herein contained shall be construed to authorize the court to compel either party to divest himself or herself of the title to real estate." This very provision is, at least, a legislative recognition that without it the court would have power to divest the title; and even these courts, in the exercise of their discretion, award the use of the separate estate of one spouse to the other for life. In Alabama the wording of the statute is, "The court pronouncing a decree shall order and decree a division of the estate of the parties in such way as to it shall seem just and right, having due regard to the rights of each party, and their children, if any;" with the provision quoted above. And the supreme court, in construing this statute in *Lovett v. Lovett*, 11 Ala. 763, says that the estate of the parties was the estate held by either husband or wife, or by them jointly.

We are clearly of the opinion that § 2007 of the code confers upon the court the power, in its discretion, to make

a division of the separate property of the wife or husband. With this view of the law of the case, and seeing no abuse of discretion by the court in its findings or conclusions, we are of the opinion that the judgment should be affirmed.

The point raised by the appellant, in regard to the refusal of the court to discharge the receiver after the appeal in this case had been taken, we think is not properly before us, and we have therefore not considered it.

Judgment of the lower court is affirmed.

ANDERS, C. J., and SCOTT, HOYT, and STILES, JJ., concur.

[No. 189. Decided June 10, 1891.]

MICHAEL J. SMITH v. VIRGINIA N. TAYLOR, *Executrix*.

WITNESS — COMPETENCY — CONTRACT WITH DECEDENT.

Where the equitable title to real estate has been decreed in the mother of a decedent, as executrix of her husband's estate, she having supplied decedent with funds of the estate with which to purchase the realty, in an action of ejectment afterward brought by the executrix against one in possession thereof under an alleged oral agreement with decedent, the evidence of defendant is inadmissible in his own behalf, either under § 389, Code 1881, or the amendment thereof in Laws 1889-90, p. 91.

On appeal in a proceeding in equity, the supreme court looks at the substance of the case as presented below, and not at any technical exceptions or objections made therein; exceptions which might be erroneous in an action at law will not be regarded as error in a proceeding in equity.

*Appeal from Superior Court, Clarke County.*

Action in ejectment by Virginia N. Taylor, executrix of the last will and testament of Frank E. Taylor, deceased, against Michael J. Smith. In December, 1885, one Frank E. Taylor, a major of the United States army stationed at

2	422
27	187
2	422
80	193

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Vancouver, Washington, held the legal title to the lands described in the complaint in this action. By some arrangement with said Taylor, the defendant entered into possession of said lands on the 26th day of December, 1885, and has continuously resided thereon with his family, and made some improvements on the land. The plaintiff in this case is the mother of Major Taylor, who died intestate on the 25th day of November, 1886, leaving a widow and minor children. Soon after his death his mother, the plaintiff in this action, made claim that she owned the land as executrix of the estate of Major Taylor's father, alleging that she had furnished the funds for the purchase of it out of her late husband's estate. She brought an amicable suit against the widow and children of Major Taylor, and on the 10th day of September, 1887, procured a decree of the court decreeing that the land was hers as such executrix. On April 7, 1890, plaintiff began the present suit in ejectment to recover possession of said lands. Defendant answered, admitting the legal title of plaintiff, but setting up as a defense a verbal contract with Major Taylor for the purchase of the lands on certain terms set forth. Judgment for plaintiff, and defendant appeals.

*Miller & Stapleton*, for appellant.

*W. Byron Daniels, Geo. H. Steward, and Gilbert & Snow*, for appellee.

The opinion of the court was delivered by

HOYT, J.—In 1885 Frank E. Taylor purchased the land in controversy herein, and took a deed therefor in his own name. Soon after such purchase the defendant in this action went upon said land, and has ever since resided thereon. After said Taylor's death his mother, as executrix of the last will of her husband, obtained a decree of the district

court holding terms at Vancouver, Clarke county, in which it was determined that she was the equitable owner of said land, and that said Taylor held the legal title in trust for her. The court thereupon decreed the entire title to be in her. After such decree was entered, she demanded of said defendant possession of the premises, and, the same being denied, brought her action in ejectment to recover the same. Defendant answered, practically admitting her title, but setting up a certain alleged oral agreement between himself and the said Taylor by virtue of which he was entitled to the possession of said land under an agreement to purchase the same for the sum of \$3,000 at any time within ten years. The contract as set out in the pleadings made it obligatory on the said Taylor to sell and the said defendant to purchase, but in the proofs defendant's own statement showed that at most the arrangement between him and said Taylor was an option under which he might purchase if he saw fit to do so, but with no agreement or obligation on his part to take the land at the price agreed upon. There was no proof worthy of the name as to any arrangement between said Taylor and the defendant excepting the testimony of the defendant himself; for, while there was some evidence of admissions and loose statements of the said Taylor by other persons than defendant, they were altogether too indefinite to found a right upon. The court below, in deciding the controversy, disregarded the testimony of said defendant, and its action in so doing constitutes one of the principal grounds of complaint here. I think that the action of the court in this matter was right, as in my opinion such evidence was inadmissible under the provisions of our statute in relation thereto. Section 389 of the Code of Washington is as follows:

“SEC. 389. Any person offered as a witness shall not be excluded from giving evidence by reason of his interest in the event of the action as a party thereto or otherwise, but

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such interest may be shown to affect his credibility: *Provided, however,* That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased or insane person, or as a guardian of a minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf."

And this was the law in force at the time of the commencement of this action. It was modified, however, by the Laws of 1889-90, so that the last clause now reads as follows:

"*Provided, however,* That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or conservator of the estate of any insane person, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person," etc.

And the law as thus modified was in force at the date of the trial. The law as thus modified seems broad enough to cover a case of this kind, beyond question. It is clear that plaintiff claimed by, through or from the deceased person, and that consequently the declarations of said deceased person to either party to the record could not be testified to by them. But appellant contends that the law in force at the date of the commencement of the action should govern, and not that of the date of the trial. I think, however, that, as these statutes provided only a rule of evidence and did not affect any right, this contention cannot be sustained. But, be that as it may, it can make no difference with the question under discussion; for, under the section of the code above quoted, before it was amended the testimony was equally as inadmissible as after such amendment. The words "legal representative" therein used, in my opinion, were intended to, and did, bring the plaintiff within the

provisions of said section. The appellant seems to have confounded the words "legal representative" with "personal representative," while it is clear that, as used in this section, such words have an entirely different meaning, and are broad enough to include the plaintiff in this case as being such a representative of the deceased person as contemplated by such statute. See *O'Neale v. Caldwell*, 3 Cranch C. C. 312; *Johnson v. Ames*, 11 Pick. 173; *Wamsley v. Orok*, 3 Neb. 350.

Appellant takes exceptions to the manner in which the objections to the testimony of said defendant were taken in the court below, and if this were an action at law there might be some force in what he says; but it must be remembered that by the answer of defendant this action was made a proceeding in equity, and that in such cases this court looks at the substance of the case as presented below, and not at any technical exceptions or objections made therein. Besides, if I were of the opinion that the testimony of said defendant had been improperly excluded in the court below, and should investigate the rights of the parties in view of all the evidence introduced, including that of the defendant, the result arrived at would not be more favorable to the appellant. The contract as testified to by him was clearly a unilateral one, under which all the rights were on his side, and none on that of the other party. By the terms thereof, he was to be allowed to buy at any time within ten years, but was under no obligation to buy at all, unless he saw fit to do so. Such a contract could only be enforced in a court of equity where it appeared that one acting thereunder had made great improvements, or otherwise put himself in such a situation that it would be unconscionable to deprive him of the benefits of the position into which the acts of the other party had led him. Defendant's own statement, however, shows that this is not such a case; for, while it is true that



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he makes use of some loose expressions as to the amount of his improvements on said land, yet when he is required to particularize he is only able to show four or five hundred dollars' worth of improvements during the whole time he was in possession, and a portion at least of this was for his own benefit, as lessee in possession, and not for the permanent improvement of the place, while a fair rental value of the premises for the time occupied by him was at least \$500.

The case made by defendant, even upon his own showing, is insufficient to authorize a court of equity to interfere with the title to the land. To authorize such action a clear case must be made, not only as to the equities which the proof tends to show, but as to the proof itself. The equitable defense failing, and the title of the plaintiff being admitted, she was entitled to the possession of the land, and the judgment of the lower court in so decreeing will be affirmed.

ANDERS, C. J., and STILES and SCOTT, JJ., concur.

DUNBAR, J., concurs in the result.

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[No. 241. Decided June 12, 1891.]

*Ex parte* LOWMAN & HANFORD STATIONERY AND PRINTING COMPANY.

NEW TRIAL—JOINT DEFENDANTS.

In an action against joint defendants, where judgment by default has been rendered against one and judgment recovered against the others on the trial of the action, it is not error to grant a new trial as to the defendants who answered and deny it as to the defaulting defendant, although the motion for a new trial may have been made in the name of all the defendants.

*Original Application for Certiorari.*

*S. M. Bruce*, for petitioner.

The opinion of the court was delivered by

HOYT, J.—This is a proceeding by the petitioner for a writ of *certiorari* to the superior court of the county of Whatcom, by which the petitioner seeks to bring into this court that portion of the record in a case therein pending which relates to the motion for a new trial filed therein, and the action of the court in granting the same, and seeks upon such record to have the action of such court vacated and set aside. It appears from the petition that, in an action pending in said court against D. P. Mason, D. W. Mason and H. K. Stewart, default and judgment were duly entered against said D. P. Mason, and that some months afterwards a trial was had as to the cause of action alleged, as against the other two defendants, upon issues made by their several answers thereto. A verdict for the plaintiff was rendered, and a motion for a new trial filed. All of said defendants in form joined in said motion. The court denied the same as to said defendant D. P. Mason, and granted it as to the other two defendants, and for that reason it is alleged by the petitioner that the action of said court was erroneous, and that, as it has no other adequate remedy, it is entitled to the writ of *certiorari*. Its contention in this regard is, that the motion being joined in by all three defendants it must be sustained as to all, or denied as to all, and that, as the judgment against said D. P. Mason had been rendered months before, he could have no relief by said motion, and therefore no relief could be given to his co-defendants joined with him in said motion. That such is the general doctrine is undoubtedly correct, and if said D. P. Mason was so far a party to the verdict sought to be set aside by such motion for a new trial as to

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be at all recognized in connection therewith, the contention of petitioner as to the action of the court upon such motion would be correct; but we think that D. P. Mason was, so far as the trial had in said cause and the verdict rendered was concerned, an entire stranger to the proceeding; and for that reason his joining in the motion had no effect thereon, and the mention of his name therein should have been and probably was treated as a nullity. This being so, the motion was in substance made only by two of said defendants, and the contention of petitioner as to the error of the court in its action thereon falls to the ground. It follows that it is not entitled to the writ prayed for.

It is an open question in this state as to whether or not this court has power, under the constitution, unaided by legislation, to grant a writ of *certiorari* to the superior courts of the state; and, if it has, whether such writ will be granted until after final judgment in the court below. The view we have taken, however, as to the effect of the motion set out in the petition herein, makes it unnecessary for us to decide these questions here. The writ will be denied.

. ANDERS, C. J., and STILES, SCOTT, and DUNBAR, JJ., concur.

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[No. 183. Decided June 15, 1891.]

SANDER-BOMAN REAL ESTATE COMPANY v. ESTATE OF SARAH B. YESLER, *Deceased*, J. D. LOWMAN, *Administrator Thereof*, AND LUCINDA HOCHSTETTLER, *Petitioner*.

SPECIFIC PERFORMANCE — DECEDENT'S CONTRACT TO CONVEY — PRACTICE — NOTICE — JUDGMENT — APPEALS.

An order vacating a decree on petition of a party who had been served with process in the proceeding by publication only, and allowing her to appear and defend the action, is not an appealable order under Laws 1889-90, p. 336, amending § 1 of the act passed

March 22, 1890, relating to removal of causes from the superior to the supreme court.

In a proceeding, under chapter 52, Code 1881, to enforce the specific performance of a contract to convey real estate made by a decedent, a notice by publication to the administrator of the estate, "and all persons having an interest in said estate," is sufficient without being directed to "all persons interested as creditors, heirs, devisees or personal representatives" thereof.

In such a proceeding, where the administrator was not served with copies of the petition and notice, and there was no adjournment of the hearing, the court was without jurisdiction at a later date to entertain the petition, or to re-open the case to allow a party served by publication only to appear and defend.

A decree in such a proceeding ordering the administrator to execute a deed forthwith, and, in default thereof within ten days, decreeing that a commissioner shall execute same, is erroneous, as, under § 630, Code 1881, a conveyance is not to be made until after the time for an appeal shall have elapsed.

*Appeal from Superior Court, King County.*

Action by the Sander-Boman Real Estate Company against the estate of Sarah B. Yesler, and others, for the specific performance of a contract by decedent to convey real estate. There was a decree directing the conveyance. Subsequently the decree was set aside on petition of Lucinda Hochstettler, one of the heirs of Sarah B. Yesler, and permission granted her to appear and defend. Plaintiff appeals from this order.

*Junius Rochester*, for appellant.

*Greene & Turner*, for appellees.

The opinion of the court was delivered by

STILES, J.—The appellant in this case filed its petition in the district court of King county in 1889, under chapter 52 of the code, claiming that its assignor had received from Sarah B. Yesler, deceased, a contract for the conveyance of certain lands in the city of Seattle. The petition was filed on the 2d day of May, and on the same day

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the judge of the district court made an order setting June 24th as the time for hearing, and directing notice of the pendency of the proceeding to be published in a weekly newspaper. No copy of the petition or notice appears to have been served upon the administrator, but upon the 31st day of May a summons was issued by the clerk of the court in the ordinary form of summons in actions at law or in equity, a copy of which was served upon the administrator by the sheriff of King county on the 3d day of June. On the 24th day of June the administrator appeared by his attorney, and filed his demurrer to the petition, on the ground that it did not state facts sufficient to constitute a cause of action. No further proceedings were taken in the matter at that time, nor does there appear to have been any adjournment of the hearing on the petition. On the 25th day of January, 1890, however, the superior court overruled the demurrer, and allowed the respondent five days in which to answer; and on February 14th the administrator by his counsel consented that his default might be entered, and that judgment be taken in accordance with the prayer of the petition. On the 3d day of March thereafter proof of publication of the notice ordered to be published was filed, the substance of which is as follows:

“Notice. In the district court of the third judicial district holding terms at Seattle, in and for King county. [Title of cause.] To J. D. Lowman, administrator of the estate of Sarah B. Yesler, deceased, and all parties having an interest in said estate: You, and each of you, will please take notice that whereas, the Sander-Boman Real Estate Company, petitioner and plaintiff herein, heretofore filed and presented its certain petition, praying, among other things, for an order of the court for the conveyance to it of the following described real estate in King county, to wit: [Description.] Now, therefore, you are notified, pursuant to an order of court heretofore entered herein on the 2d day of May, 1889, that Monday, the 24th day of June, 1889, being a day of the regular term of said district

court, at 11 o'clock A. M., at the court-room in the courthouse in the city of Seattle, said petition will be heard when and where all parties interested as creditors, devisees, or personal representatives of Sarah B. Yesler may appear and show cause, if any they have or can show, why the prayer of said petitioner shall not be granted. [Attested by the clerk.]”

On the same day a decree was entered directing the administrator to forthwith execute a deed to the petitioner for the real estate described, and it was further ordered that, if the administrator should fail to execute such deed within ten days after the date of the judgment, a commissioner, who was named, should execute such deed in his place. Subsequently, and on the 26th day of August, 1890, Lucinda Hochstettler, the appellee in this court, who was one of the heirs at law of the deceased, Mrs. Yesler, filed in the superior court of King county a petition showing that she had not been served with process in said proceeding in any other way than by publication; and upon a proposed answer, filed at the same time, asked to be allowed to appear in said action and defend the same upon terms. The court thereupon granted the petition, set aside the judgment and allowed the petitioner to appear and defend the action. This appeal was taken from the order last mentioned, and although the point was not raised by the appellee on the hearing in this court, the question whether or not this was an order such as was appealable goes directly to our jurisdiction, and we must notice it as a preliminary to the further consideration of the case.

The appellant seems to have proceeded upon the assumption that such an appeal was justified by § 1 of the act of 1890 (page 333), wherein it is provided that an appeal can be taken to this court “from a final order made in special proceedings, affecting a substantial right therein, or made on a summary application in an action after judgment, or from an order granting a new trial.” Probably,

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had § 1 been permitted to stand as the law of the state beyond the end of the session of the legislature which passed it, the proposition that this case is covered by it, and that the order was therefore appealable, would be well taken, inasmuch as the order setting aside this judgment was in the nature, at least, of one granting a new trial. Unfortunately, on the 27th day of March, 1890, the same legislature passed another act, which is found upon page 336 of the session laws, in which § 1 of the act of March 22d was entirely repealed. The views of this court upon the subject of appeals in this respect are set forth in the case of *Windt v. Banniza*, ante, p. 147. We are constrained to hold, therefore, that this court has no jurisdiction to hear this cause in its present condition.

However, as both parties appear to have submitted their controversy, it will, perhaps, save further expense and loss of time in this matter if we indicate in this opinion the position in which the facts shown seem to place the case. The principal contention of the appellant is, that the order of the court setting aside the former judgment, and allowing one of the heirs of Mrs. Yesler to appear and defend, was erroneous, in that § 67 of the code, under which the petition was filed, has no reference to such proceedings as were taken by the original petitioner, but claims that the provisions of § 67 apply only to ordinary actions at law or equity. With this view we are inclined to agree, inasmuch as chapter 52 is really a species of proceedings ancillary to the administration of estates in the probate court. In fact, the action therein provided to be taken in the district court is almost universally, in other states, confined to the court having general probate jurisdiction. Pomeroy on Specific Performance, § 497, and note. For some reason or other, the cogency of which is not entirely apparent, our legislature saw fit to impose the duty of passing upon questions of this kind, in the first instance, upon the district court

instead of the probate court, but, although it changed the forum in which the cause was to be heard, we see no indication that there was any intention to change the usual mode of procedure in the probate court, and we should therefore be inclined to hold that the action of the court in setting aside the judgment and allowing the petitioner to defend was unwarranted by statute. On the other hand, however, this proceeding being in the nature of a special probate proceeding, was hedged about with all the rules applying to analogous proceedings in a probate court. It was necessary, therefore, for the district court, both in acquiring jurisdiction and in any final judgment entered by it, to follow the statute strictly.

The appellee contends that the notice as published was not sufficient, in that it was not directed to the creditors, heirs, devisees or personal representatives of Mrs. Yesler, who are authorized by § 625 to appear and resist the petition, but only to the personal representatives, "and all persons having an interest in said estate." This point seems hardly to be well taken. The notice contended for would not be required in usual probate proceedings, and we think it was unnecessary here.

The next point appellee makes, however, as well as the one which follows it, seem to us to have been defects fatal to the jurisdiction of the court. In the *first* place, no copy of the petition or notice appears to have been served upon the administrator at any time. True, a summons was served upon him, but that did not take the place of the service required by the statute. *Secondly*, the hearing was set for June 24th, and the statute requires that such hearing shall be had upon the day fixed by the court, or at such other time as the same may be adjourned to. No adjournment was made, and no further proceedings were taken for more than six months thereafter, and when the judgment was rendered the court therefore had lost all jurisdiction of the



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matter. This position of the case would seem to have left the court without power either to enter the judgment on the 5th day of March, 1890, or later to entertain a petition on the part of Mrs. Hochstettler to be allowed to appear and defend; for certainly, if the court could not enter a judgment, then neither could it subsequently re-open the case, hear it again, and enter another judgment.

The judgment seems to be erroneous, in this: The statute provides that the court may decree a conveyance, but the plain intention of it is that the conveyance is not to be made until after the time for an appeal (six months) shall have elapsed. In the mean time the party entitled to the decree is to be permitted to have possession of the real estate, but the deed is not due until the time for appeal has expired. In this case the deed was ordered forthwith, and, in default of its execution within ten days by the administrator, the commissioner was required to execute it at once. No practice of this kind is provided for.

The appeal must be dismissed, and it is so ordered.

ANDERS, C. J., and DUNBAR and HOYT, JJ., concur.

SCOTT, J., concurs in the result.

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[No. 167. Decided June 15, 1891.]

DEXTER HORTON & Co., *Bankers*, v. E. E. LONG, *Trustee*.

FORECLOSURE OF MORTGAGE — PLEADING — CORPORATION — ULTRA VIRES — ATTORNEY'S FEE.

In an action to foreclose a mortgage the allegation that a party, who is made co-defendant with the mortgagor, has, or claims to have, some interest in, or claim upon, the mortgaged premises, is sufficient without averring the character of the interest.

Where a mortgage by a corporation was not authorized by its trustees, but was executed by its president and secretary, who were two of its three trustees, and the corporation received the benefits of the mortgage, the defects in its original execution will be regarded as cured by ratification.

2	435
13	310
14	526

Where the complaint in a foreclosure proceeding alleges that \$250 is a reasonable attorney's fee, and the answer denies that any greater sum than \$100 is a reasonable fee, the court should, in the absence of testimony on the point, find that \$100 is a reasonable attorney's fee.

*Appeal from Superior Court, King County.*

Action by E. E. Long, trustee, to foreclose a mortgage executed by Builders' Material Company, to which Dexter Horton & Co. were made defendants, on the ground that they claimed to have some interest in the property. The Builders' Material Company never appeared or answered, and judgment was entered against it by default. Dexter Horton & Co. filed its demurrer upon the ground "that said complaint does not state facts sufficient to constitute a cause of action against this defendant." Demurrer overruled, and defendant answered over, denying the allegations of the complaint, but not setting up its interest in the property. Judgment for plaintiff, and Dexter Horton & Co. appeal.

*Cole, Blaine & De Vries*, for appellant.

All the corporate powers of a corporation, under the laws of Washington, must be exercised by a board of trustees. Code 1881, § 2425; *Gashwiler v. Willis*, 33 Cal. 12 (91 Am. Dec. 607); *McCullough v. Moss*, 5 Denio, 567; *Leggett v. Banking Co.*, 1 N. J. Eq. 541 (23 Am. Dec. 728). The execution of a mortgage is the exercise of a corporate power. *Gashwiler v. Willis*, 33 Cal. 19 (91 Am. Dec. 607). It is not an ordinary duty of the president and secretary to execute a mortgage. *Leggett v. Banking Co.*, 1 N. J. Eq. 554 (23 Am. Dec. 728); *Hoyt v. Thompson*, 5 N. Y. 334; *Bliss v. Kaweah, etc., Co.*, 65 Cal. 504. The power to them, if any, must be a delegated power; and such power is never presumed; it must be proved. *Twelfth Street Market Co. v. Jackson*, 102 Pa. St. 274; *Morawetz, Priv. Corp.*, § 616.

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June, 1891.] Opinion of the Court — DUNBAR, J.

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*Allen & Powell*, for appellee.

The allegation as to appellant's interest in the property is sufficient. If appellant desired to maintain its interest in this action it was its duty to plead its interest, if it had any. *Poett v. Stearns*, 28 Cal. 227, and 31 Cal. 78; *Anthony v. Nye*, 30 Cal. 402 (89 Am. Dec. 124); 1 Daniel's Chancery, §§ 330, 274, 275, 366; Pomeroy's Remedies (2d ed.), § 341; *Mitchell v. Steelman*, 8 Cal. 369; *Martin v. Noble*, 29 Ind. 216.

Neither the Builders' Material Company nor appellant can deny the authority of the officers to execute the instrument. 2 Morawetz, Priv. Corp. (2d ed.), § 585, *et seq.*; *Union Nat. Bank v. Matthews*, 98 U. S. 621; *Jones v. New York, etc., Co.*, 101 U. S. 622; *Wright v. Hughes*, 119 Ind. 324 (12 Am. St. Rep. 412); *Gordon v. Preston*, 1 Watts, 385 (26 Am. Dec. 75); *Beecher v. Rolling Mill Co.*, 45 Mich. 103.

The defendant, the Builders' Material Company, has, by its silence and acquiescence in, and acting under and appropriating the fruits of, the contract, estopped itself and those claiming under it from denying its validity. *Zabriskie v. Cleveland*, 23 How. 384; *Bissell v. Jeffersonville*, 24 How. 287; *County v. Emigrant Co.*, 93 U. S. 124; *Gas Co. v. City of San Francisco*, 9 Cal. 453; *Pixley v. Railroad Co.*, 33 Cal. 192 (91 Am. Dec. 623); *Hitchcock v. Galveston*, 96 U. S. 341; *Oakland v. Rier*, 52 Cal. 270; *Argenti v. City of San Francisco*, 16 Cal. 256; *Main v. Casserly*, 67 Cal. 128; *Wright v. Hughes*, 119 Ind. 324 (12 Am. St. Rep. 412); *Jones v. New York, etc., Co.*, 101 U. S. 622; *Union National Bank v. Matthews*, 98 U. S. 621.

The opinion of the court was delivered by

DUNBAR, J. — We are of the opinion that, construing the complaint together, and considering the relief prayed for, the complaint is simply for a foreclosure of a mortgage, and that the question of whether or not the vendor's lien exists in this state is not in issue in this case. There were

some allegations in the complaint which were not necessary to a complaint in foreclosure, but they were subject to a motion to strike, and were not grounds of demurrer. The demurrer, we think, was properly overruled.

It is contended by the appellant that the complaint should have alleged what interest the appellee had in the lands which plaintiff sought to foreclose. The sufficiency of the complaint in this respect, it seems to us, is established by almost universal usage. The form prescribed by Estee is:

“The defendant has or claims some interest in or lien upon the said real property; but the same, whatever it may be, is subject to the lien of the said mortgage.”

This is substantially the same as the tenth allegation in the complaint in this clause, and is all the allegation that is necessary. The defendants' answer was a general denial, and their claim, if they had any, was not disclosed. It is claimed by the appellant that this was not a disclaimer of interest, and that it put in issue the fact that it was subject to plaintiff's lien, and cites *Elder v. Spinks*, 53 Cal. 293, in support of its contention. This case evidently sustains appellant's theory, but is in conflict with the earlier California authorities, and, we believe, with the well established and generally recognized practice. In *Anthony v. Nye*, 30 Cal. 402 (89 Am. Dec. 124), it was held that in an action to foreclose a mortgage, the allegation that a party who is made co-defendant with the mortgagor has, or claims to have, some interest or claim upon the mortgaged premises, is sufficient without averring the character of the interest; and Judge SAWYER, who rendered the opinion, says: “The allegation of her claim and interest is in the form universally adopted and long established. The plaintiff is not supposed to know the nature of every person's claim. It is enough that a claim is set up. It is the defendant's business, when thus called upon, to disclose its nature. There is no personal judgment against the wife. If she has no claim, she is in

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June, 1891.] Opinion of the Court—DUNBAR, J.

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no way injured. If she has any, she has had an opportunity to present it. There is neither merit nor plausibility in the objection"—the objection being that the complaint did not disclose the defendant's interest. To the same effect, see *Mitchell v. Steelman*, 8 Cal. 363; Pomeroy on Remedies (2d ed.), § 341. We think the doctrine laid down by the earlier California courts much more in harmony with the general rules governing pleadings than the doctrine promulgated by the latter case, and therefore feel bound to follow it. The only object in making Dexter Horton & Co. parties to the suit was to settle any claim that they might set up to the mortgaged premises. The object of the law in permitting this is to avoid a multiplicity of suits, so that all claimants may have their rights adjusted in one action.

Another objection raised by the appellant is, that the mortgage was not executed by the trustees of the defendant corporation, but that the president and secretary, by whom the mortgage was executed, had no authority to enter into such a contract, and that it was therefore *ultra vires*. Even conceding that the contract was *ultra vires*, and that the appellant has placed himself in a position in this case to legally allege it, under the testimony in this case it will not avail against the plaintiff. The corporation was attempting to execute a *bona fide* mortgage. It was within the power of the corporation to execute it, and its officers and agents were trying to carry out the will of the corporation. There were but three trustees, and two of them signed the mortgage, but not as trustees. They did not go through the form of an authorization by resolution, but a majority of those who had power to pass the resolution, by a short cut, brought about the result which the resolution would have authorized. The formality of the resolution, it is true, was omitted, but the corporation taking possession of the property by virtue of the mortgage indorsed its execution, and if there were any techni-

cal defect in its original execution it has been cured by acquiescence and ratification. Where money has been obtained by a corporation upon its securities, which are irregular and *ultra vires*, but the money was applied for the benefit of the company with the knowledge and acquiescence of the stockholders, the company and the shareholders are estopped from denying the liability of the company to repay it. *In re Cork & Youghal Ry. Co.*, L. R. 4 Ch. App. 748. And a court of equity abhors forfeitures, and will not lend its aid to enforce them. *Marshall v. Vicksburg*, 15 Wall. 146. Neither will it give its aid to the assurance of a mere legal right contrary to the equity and justice of the case. *Lewis v. Lyons*, 13 Ill. 117. In this case the contract is not executory, but is executed, and a stronger rule obtains in favor of the validity of the contract. Says the supreme court in *Bradley v. Ballard*, 55 Ill. 413 (8 Am. Rep. 656):

“But if any one of the parties proceeds in the performance of the contract, expending his money and his labor in the production of values which the corporation appropriates, we can never hold the corporation excused from payment on the plea that the contract was beyond its power.”

Such we believe to be the doctrine of the authorities generally.

We have examined the other points raised by appellant, and are unable to find any error. All the facts found by the court are, in our opinion, justified by the testimony, with the exception of the fact that \$150 is a reasonable attorney's fee. The complaint alleged \$250 as a reasonable attorney's fee. The answer denied that any greater sum than \$100 is a reasonable attorney's fee in this case. There being no testimony offered on this point, and as the reasonableness of an attorney's fee, when denied, must be proven as any other fact, the court should have found that \$100 was a reasonable attorney's fee, and rendered judg-

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Syllabus.

ment accordingly. The case will be remitted to the lower court, with instructions to modify the judgment in accordance with this opinion.

ANDERS, C. J., and SCOTT and STILES, JJ., concur.

HOYT, J., did not sit at the hearing.

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10	118
J10	123
27*	267
38*	1061
38*	1063

[No. 187. Decided June 15, 1891.]

FLETCHER R. FIELDS, SIMON G. FIELDS AND NANCY E.  
FIELDS v. SARAH J. FIELDS.

DIVORCE—DIVISION OF PROPERTY—FRAUDULENT CONVEYANCE—  
CUSTODY OF CHILDREN.

Under § 2007, Code 1881, the court decreeing a divorce has power to make division of all the property of the parties, whether it is community or separate property, and the court will consider through whom the property was acquired merely as a circumstance to aid it in making an equitable division.

Where a man, just prior to commencing a suit for divorce, conveys to his brother all his real and personal property, including his home, without receiving any cash payment therefor, or any written security, without any definite time of payment agreed upon, and dependent upon the grantee's verbal promise to give him some money from time to time, the conveyance will be held fraudulent as against the wife.

A decree awarding the custody of children to the wife, although her conduct may not be entirely blameless, will be upheld where it is shown that the husband is in the habit of getting under the influence of liquor, that he has treated his wife harshly and cruelly, sometimes striking her, and has made charges of adultery against her which he has failed to sustain.

*Appeal from Superior Court, Walla Walla County.*

*D. J. Crowley, and Geo. T. Thompson, for appellants.*

*Brents & Clark, for appellee.*

The opinion of the court was delivered by

DUNBAR, J.—This action is brought by the plaintiff against the defendant for a decree of divorce, the division of the property, and the custody of the minor children. It seems from the testimony that the plaintiff and defendant commenced living together in 1873; that a marriage license was obtained; that they went to a neighboring town for the purpose of getting married, but returned without having the marriage ceremony performed; that they represented themselves as husband and wife; that they lived and cohabited together as husband and wife; that several children were born to them; that they conveyed and encumbered land as husband and wife; and that in the community in which they lived they were generally thought to be husband and wife; that this state of affairs existed until about three years before the commencement of this action, when they had the marriage ceremony performed in the statutory form. At the time they commenced living together in 1873 the defendant had no property, and the plaintiff had property variously estimated at from two to eight thousand dollars. The court below found it was worth \$3,000, which was probably a reasonable valuation. There are now living two minor children the fruits of their union, to wit: Maud May Fields, aged twelve years; and Fletcher R. Fields, Jr., aged five years. The complaint alleges that the parties plaintiff and defendant were intermarried on February 6, 1888; alleges cruel and inhuman treatment on the part of the defendant towards plaintiff, and charges defendant with adultery with divers persons, some named and others unnamed. The answer of the defendant is a denial of the adultery and of the cruel and inhuman treatment charged, and alleges various acts of cruelty on the part of the plaintiff, such as frequently and falsely accusing her of adultery with divers and sundry people, applying to her in-



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June, 1891.] Opinion of the Court—DUNBAR, J.

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sulting, degrading and opprobrious epithets, and vulgar and indecent names, in the hearing of others, and that he had cursed and applied vile epithets to his little daughter; that he had struck defendant, and threatened to kill her, and drove her away from their house; that for the last two years he was in the habit of being frequently drunk; and many other damaging allegations. Defendant alleges their intermarriage in October, 1873. The reply of plaintiff denies all affirmative allegations in the answer, excepting that he admits that on the 23d day of April, 1890, he struck plaintiff; and admits that during the last two years he has been occasionally drunk. Afterwards, on the petition of defendant, alleging the conveyance of Fletcher R. Fields to Simon G. Fields of certain lands claimed to belong jointly to the plaintiff and defendant, the said Simon G. Fields and his wife, Nancy E. Fields, were made parties to this action, and filed an answer denying the fraudulency of the conveyance, and alleging that said conveyance was made in good faith.

The principal legal discussion in this case was as to the *status* of the property with relation to the community property laws. Appellants contended that a great portion, if not all, the property involved, was the separate property of the husband; and appellee contended that it was community property. The decision of the court in *Webster v. Webster*, ante, p. 417 (at this term), eliminates that question from this case, as it was there held that under the provisions of § 2007 of the code, the court decreeing a divorce has power to make division of all the property of the parties, whether it was community or separate property, and the court would only consider through whom the property was acquired as a circumstance to aid it in making an equitable division; and, while it is a circumstance to be considered, it is not a controlling fact, but will be considered by the court as any other important fact in the case.

Some discussion was had as to the extent of the authority conferred by a power of attorney given by the defendant to the plaintiff, under authority of which plaintiff conveyed the land to Simon G. Fields. Without discussing the legality or potency of the instrument, it seems to me that the unusual character of this transaction and all the circumstances surrounding it conclusively point to fraud on the part of the plaintiff, if not also on the part of Simon G. Fields. Here was an \$18,000 transaction, involving all the property, according to the testimony of the plaintiff, that he had; involving the home of himself and family, sold to his own brother, just prior to the time he commenced suit against his wife for divorce, and when he evidently had the suit in contemplation (the deed being executed May 11, 1890, and the complaint filed in the clerk's office the 14th day of May succeeding); a wife who had a short time before brought two suits for divorce; a wife whom he testified was "trying to break him up;" a sale made and deed executed on the strength of a power of attorney the legality of which he was doubtful of himself, and made after he had tried and failed to get a good power of attorney from the defendant, and after her refusal to give a better power of attorney had been made known to the purchaser. It is not thus that business is transacted that is open and above board. If the defendant refused to execute the power of attorney, and both of the parties to the sale knew this, it was notice to them that she did not wish to convey any property under the power of attorney already given, and was undoubtedly intended by her, and understood by them, as a revocation of the power of attorney, and from that they understood her unwillingness to sell; but, notwithstanding this fact, on failing to obtain a better power of attorney, they concluded to chance the one they had. We quote from the testimony of Simon G. Fields on cross-examination:

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“Q. You knew at the time you bought this place, did you not, that his wife had some trouble, and he intended to bring this suit? A. I didn’t know he was going to bring it so soon. I knew he had started to do it once or twice before that. I expected suit would be brought.

“Q. You were expected to obtain this property, and hold it during the suit, were you not? A. I don’t know as I was.

“Q. Wasn’t that the object in the transfer of this property? A. No, sir.

“Q. How did you pay him for it? A. I haven’t paid him yet.

“Q. How did you secure him? Did you give him a mortgage? A. No, sir.

“Q. And you gave no security at all, then? A. None only my word. He owed me a little, and he was to have the crop.

“Q. Has he not asked you for any notes or mortgages or anything? A. No, sir.

“Q. The court: Did he take your word for the whole price of eighteen thousand dollars? A. Yes, sir.

“Q. The deed was the only writing that passed between you? You were to deed this place back to him after suit were you not? A. I was to deed it back if I wanted to.”

Witness also testified that he was to pay no interest on the purchase price, and that there was no definite time at which the payment was to be made; or, to use his own words:

“Well, he said he would give me time. He said he would want some money off and on. I said I would give him some money at times. There was no fixed time.”

There was really no agreed valuation of the land, according to their own statement; for there was no interest to be paid, and the real price to be paid would depend upon the time of the payment of the principal, and, as this time was not agreed upon, the actual agreed price of the land could not have been determined. In my judgment the whole

transaction is inconsistent with the theory of good faith. Men of good business capacity, as the plaintiff is conceded to be, do not transact important business in this way.

There seems to be no doubt that the parties commenced living together as husband and wife in the fall of 1873; and, while neither party in this case is probably entirely blameless, the testimony of the plaintiff, in his attempt to evade the fact that he had held defendant out to the world as his wife, has a tendency to weaken the effect of his testimony on other points; and the entire failure of plaintiff to prove the charges of adultery against his wife is to be taken against him. These are charges which a man with a proper appreciation of the domestic relation would hesitate to make against the mother of his children under any circumstances, and where the proof utterly fails, as in this case, shows a very debased condition of mind. Outside of the testimony of defendant as to harsh and cruel treatment, plaintiff himself admits of having struck her on one occasion. A distinguished writer has said:

“He who lays his hand upon a woman, save in the way of kindness, is a wretch, whom it were base flattery to call a man.”

This sentiment, while poetically expressed, is literally true; for, no matter what the provocation may be, there is no palliation or excuse for this brutal offense. Plaintiff also admits having been drunk several times during the last two years, and the testimony outside of his own admission shows that he has been under the influence of liquor a considerable portion of the time; to such an extent, at least, that he is evidently not a proper person to be intrusted with the care and guardianship of the children. Taking all the circumstances of the case into consideration, without further particularizing, we think there was no abuse of discretion by the judge who tried the case, and

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June, 1891.]Statement of the Case.

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that the judgment should therefore be affirmed, including the allowance of \$150 for services of defendant's attorneys in this court, and it is so ordered.

HOYT, SCOTT, and STILES, JJ., concur.

ANDERS, C. J., not sitting.

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[No. 199. Decided June 15, 1891.]

MARY JANSON v. ANDREW GUSTAVE PETERSON AND  
CHRISTINA L. PETERSON.

SPECIFIC PERFORMANCE—CONTRACT TO CONVEY.

In an action for specific performance, where the evidence shows that plaintiff entered into possession of land and improved same under a contract for its purchase from defendant for the price of \$350, one-third to be paid at the time the deed passed, and the balance in a reasonable time; and that plaintiff made payments amounting to the sum of \$80, and subsequently tendered the balance of \$350, with interest, and demanded a deed, which defendant refused on the ground that "he did not pay it when he agreed to a year before," a decree in favor of plaintiff should be sustained.

*Appeal from Superior Court, King County.*

Action for specific performance of an oral agreement for the sale of land by Andrew Gustave Peterson and Christina L. Peterson against Mary Janson, the contract price being alleged in the complaint as the sum of \$350. The court found that the price was fixed at \$350, contingent upon appellees' helping appellant through her sickness, and that appellees did so help her; that no specific time was fixed for the payment of the purchase price except that one-third should be paid down as soon as the defendant could give a deed, and for the balance a reasonable time should be given; that immediately after making the agreement,

appellees brought lumber upon the lot and improved it by erecting a house into which they immediately moved, and in the spring of 1890 added to said improvements, at a cost to appellees of about \$400; that appellant resided within twenty or thirty rods of said land, and could and did see the improvements erected thereon from day to day and made no objection thereto; that appellees paid and appellant received on account of said purchase price, ten dollars, in May, 1889; twenty dollars in June, 1889; and fifty dollars in February, 1890; that in February, 1890, prior to the bringing of this suit, appellees tendered appellant \$310 and demanded a conveyance of the land; that appellees demanded from appellant a number of times a bond for a deed or some other security or writing as evidence of appellant's contract to convey, and appellant in response to such requests, agreed to give such bond or writing as soon as she was able to get out, she being then sick, but no bond or writing was ever given; that said demands for a bond and promise to give same occurred after the making of the agreement to convey, and when appellees were in possession of the property. Judgment for plaintiffs and defendant appeals, alleging as error that the evidence does not support the findings of the court, nor the allegations of appellees' complaint.

*Thompson, Edsen & Humphries*, for appellant.

*Greene & Turner*, for appellees.

The opinion of the court was delivered by

DUNBAR, J. — We have looked into this case, and find no error substantially affecting the rights of appellant. One of the findings of the court was that the purchase price agreed upon in said oral agreement was to be the sum of \$350 if the plaintiff, Christina L. Peterson, should care for and nurse defendant during a certain sickness; but, if said

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Opinion of the Court—DUNBAR, J.

plaintiff, Christina L. Peterson, should not so care for and nurse said defendant, then the purchase price was to be the sum of \$400. We think the court, from all the testimony, should have found that the agreed price of the lot was \$350, one-third to be paid at the time the deed passed, and the balance in a reasonable time. However, we are satisfied from the testimony of appellant, especially as shown on page 42 of the record, that it was not the difference between \$350 and \$400 that caused her to refuse the tender, but because she had concluded not to deed appellee the land at all, for the reason alleged by her that "he did not pay it when he agreed to a year before." There is no dispute about the fact that under the contract the appellees went into immediate possession; that they commenced building a house immediately, and that they moved into the house; and that they have lived there ever since; and that appellant knew this, and never raised any objection to it. We cannot agree with the appellant that the proof shows that the improvements did not exceed \$150. The appellant testified that the improvements could not be sold for more than \$150; but the appellees, who put the improvements there, testified that the first improvements made were a house worth \$300, and other improvements of the value of \$100. The house was a basement and three rooms, in which appellees and their four children lived until about the commencement of this action, when some further additions were made. We think the whole testimony fairly justifies the conclusion that the \$10 and \$20 payments were intended by the appellees as payments on the lot, and were received as such by appellant, and that the order given Wood on appellee Peterson by Mrs. Janson of \$50 was intended by appellant to be placed to the Petersons' credit on the lot transaction, and was so understood by Peterson when he honored and paid the order. While there is undoubtedly conflict of testimony on nearly all the

questions of fact raised by the pleading, in the judgment of this court the material allegations of the complaint are sustained by the testimony. The judgment will be affirmed.

ANDERS, C. J., and SCOTT, STILES, and HOYT, JJ., concur.

[No. 247. Decided June 15, 1891.]

THE EDISON ELECTRIC ILLUMINATING CO. v. MARTIN  
A. NEEDHAM *et al.*

APPEALS—FAILURE TO FILE TRANSCRIPT AND BRIEF.

Where appellant fails to file a transcript and to serve and file a brief as provided by law and the rules of this court, and gives no reason or excuse for such failure, the appeal will be dismissed.

*Appeal from Superior Court, Spokane County.*

*Arthur & Regan*, for appellees.

*Per Ouriam:* On the 18th day of August, 1890, judgment was rendered in this cause, in the court below, in favor of defendants, appellees here, for costs, and dismissing plaintiff's complaint. On the same day the plaintiff, in open court, gave notice of appeal from said judgment to the supreme court of the State of Washington, and thereupon filed a *supersedeas* bond, by order of the court, in the sum of \$5,000. Appellees having filed in this court a certified copy of the judgment appealed from, and of the notice of appeal, move to dismiss this appeal because appellant has failed to cause a transcript to be prepared, and has failed to serve and file a brief as provided by law, and the rules of this court. Due notice of the motion was served upon appellant more than ten days previous to



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Opinion of the Court—Scott, J.

the date fixed for the hearing, and it appearing that the time prescribed for preparing and filing the transcript, and for serving and filing a brief, has long since expired, and that no transcript or brief has been filed, and that no reason or excuse has been given or made for failing so to do, the appeal must be dismissed at the cost of appellant, and it is so ordered.

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[No. 180. Decided June 17, 1891.]

THE SEATTLE LAND COMPANY v. BENJAMIN F. DAY.

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REAL ESTATE BROKER—CONTRACT—COMMISSION—WRITTEN  
INSTRUMENT—EVIDENCE.

Testimony by defendant as to the length of time a bond had to run is admissible without proof of its loss, where such evidence is not offered to prove the contents of the bond, but is given as part of a conversation with the plaintiff, and for the purpose of showing defendant's version of the contract between them for a sale of the bonded land to other parties.

Where land bonded for \$16,000 is placed in a real estate broker's hands for sale under contract that the holder of the bond should first make \$500 out of any sale the broker might negotiate, the broker to have all profit in excess thereof, and a sale was negotiated for \$18,000, which the purchaser subsequently refused to complete on the ground of defect of title, the broker is not entitled to a commission.

*Appeal from Superior Court, King County.*

The facts are fully stated in the opinion.

*V. H. Faben, and George D. Blake, for appellant.*

*McClure & Wheeler, and W. H. Thompson, for appellee.*

The opinion of the court was delivered by

SCOTT, J.—Appellant brought this suit to recover \$1,500 from appellee, as a commission due for finding a pur-

chaser for certain real estate. The controversy was in relation to the contract between the parties to the action. Appellant claimed that appellee listed the property in the ordinary manner with it for sale, and agreed to pay appellant such sum as it could sell it for in excess of \$16,500; that it found a purchaser ready and willing to buy the property, and pay \$18,000 for it, but that upon investigation the title proved to be defective, by reason whereof the sale was prevented. Appellee disputed that the contract was as claimed by appellant, and contended that the agreement was in the nature of a joint speculation between the parties, by the terms of which appellant was to receive nothing unless the sale was actually made. He also insisted that the title was not defective, but admitted that the party procured by appellant refused to take the property on account of what he alleged and was advised was a defect therein. Appellant claimed, further, that if the title was not defective, and if the contract was as claimed by appellee, it was his duty to have entered into a contract with the proposed purchaser at the first opportunity, thereby binding him so that he would have been compelled to take the property, and as appellee did not do so, appellant was entitled to recover. The jury found a verdict for the defendant. Appellant claims that there was no evidence to sustain this verdict, and that it was entitled to recover upon appellee's own showing.

It seems that appellee had only a bond for a deed to the property, which was about to expire. This, however, was not the defect complained of. C. B. Holman, appellant's secretary, and who was acting for appellant in the premises, said in his testimony that, in making the contract, the defendant Day stated to him that he had a piece of land under bond, which he was willing to sell for \$16,500 net to him, and asked him if they could procure a purchaser; that he told him he believed they could, and that thereupon Day

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June, 1891.]Opinion of the Court—SCOTT, J.

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listed the property with them at the price mentioned, agreeing to give them all over that price they could sell it for, and assured him that the title was all right; that they sold the property through L. H. Griffith & Co. to a Mr. Blewett for \$18,000, and took a check thereon for \$500, which he gave to the defendant at the depot of the Lake Shore & Eastern Railway as he (Day) was about to leave for home; that Day made no objection to the sale, and assured him that it was all right; that a day or so after that—the next day he thought—the defendant was down again, and they went to the office of Griffith & Co., and there met Mr. Blewett, who then again said he was willing to pay the price for the land. Witness did not purport to give all the conversation that took place there, but admitted that Day urged Blewett to take the property “before some little preliminaries of the title were straightened out,” which Blewett refused to do. On cross-examination, witness also admitted that he had tried to get the Guaranty Title & Insurance Company to insure the title to the property, and that he failed to effect such insurance. He said he did not understand the failure was due to any defect in the title, but rather to delay upon the part of the company in acting upon the proposition. There was testimony to show that the attempt to insure was prior to the negotiations with Blewett. Edward Blewett, the person to whom the sale had been made, testified that he had no conversation with Mr. Day until he had bought the land from Mr. Griffith, and then went to see Day about the title. Day said he would clear the title up or give him the money back; that he asked him how long it would take to clear it up; Day told him, and he said he would take his money back; that by the terms of the proposed purchase, as he understood them, the title was to be made satisfactory to him. The defendant testified that, at the first conversation he had

with Holman in regard to selling the land, he said to Holman that he had the property, under a bond for \$16,000, from J. H. McGraw; that the bond would expire in ten days, and that, if they could sell the land within that time, he would give them half of what they (the plaintiff and Day) could make out of it; that they made an effort, and failed, and when the bond was about to expire he again saw Holman, and told him he was going to be bothered to raise the money to take the land, and that if they could make him \$500 out of it, he would rather have that than nothing, and that they could have all they could sell it for over \$16,500; that he did not discuss the matter of title with him; that he never said to them that the title to the land was good; that he did not pretend to have any title; that Holman saw the bond, and also an abstract of the title, which he got and gave to him, and that Holman knew all about it; that at one time he had some talk with him about getting the title insured; that Holman at that time was trying to make a pool with other parties to take the land, and was afraid something might come up, and suggested that they get it insured, each of them to pay one-half of the cost. Holman testified that he made no effort to sell the property after the negotiations with Blewett.

Appellant moved to strike the testimony of defendant as to the time the bond had to run, on the ground that it was not the best evidence. Testimony had been introduced tending to show the subsequent loss of the bond, which appellant claimed was not sufficient to admit parol proof of its contents. The court remarked that the witness had been allowed to testify to the length of time the bond had to run without objection, and denied the motion, to which appellant excepted. There was no error herein. The testimony was not offered to prove the contents of the bond, but was given in showing defendant's version of the

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contract he entered into with the appellant, and as a part of the conversation which took place at the time between the defendant and Holman.

The defendant further testified that he accepted the \$500, and, when Mr. Blewett refused to take the property, he gave it back to him; that the bond had then expired, but that Mr. McGraw took no advantage of the lapse, and at his request executed a deed to Blewett, which he (Day) tendered to Blewett, and which Blewett refused to accept. Witness testified that he always believed the title to be good, and believed so now. The deeds showing the chain of title were not sent up, but it appears from the testimony that the defect complained of was that the deed to McGraw ran to "John H. McGraw, trustee," and a question was made as to the effect of such a description. The character of the defect, however, or whether there was any defect, is immaterial, if the contract was as claimed by the defendant, and the jury must have adopted his view of it. It is not contended that there was any unreasonable delay upon the part of Day in procuring and tendering the deed to Blewett, or in undertaking to carry out his part of the agreement. It is not claimed that any demand was made by appellant at the time Holman gave Day the check, or at any time, that he should enter into a contract with Blewett. Had there been such a demand, and an unreasonable delay or failure upon the part of appellee, appellant's position would be well taken; and this would be true, in the absence of a demand, had there been any neglect or failure of the defendant to undertake to fulfill his part of the agreement. But there was no evidence of such a failure. On the contrary, there was testimony by appellant that on the next day after defendant was notified of the bargain, he returned to town and proceeded to perform his part of it, and that at this very time—the first meeting between

Blewett and Day—Blewett objected to the condition of the title, and refused to take the property, which Day was urging him to do, or to allow Day time to remove or correct the alleged defect. Undoubtedly, if the facts were according to appellant's contention that the contract with Day was the ordinary one to sell upon commission, and that Day represented that the title was all right, or if nothing was said about the title, and appellant had no knowledge of any defect therein which would be likely to cause a non-completion of a sale it might negotiate, appellant was entitled to recover. There was substantially no controversy over the law applicable to such contracts, but the jury found that the contract was as claimed by the defendant; that appellant's pay was contingent upon the fact that the sale should be completed; and that he (Day) should first receive \$500 in excess of the \$16,000 he was to pay McGraw; this was a condition precedent, and there was evidence to support the verdict, and that the circumstances connected with the property were known to appellant, and the contract between it and Day was made with reference thereto; that appellant as well as Day took chances upon the sale being completed and the money received; that it was a joint speculative undertaking, by which the profits were to be divided; that the second conversation was had in the light of the prior talk upon the subject, and was connected therewith; and also in the second conversation, according to the defendant's testimony, it was stated and made a condition that he was to first make \$500 out of any sale appellant might arrange for or negotiate. How could Day make anything unless the sale was completed? The subsequent conversation, according to Day's version of it, simply provided for a different recompense to be paid appellant in case of a sale, from that which was first agreed upon, and did not change the pre-

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vious understanding, except as to the price appellant was to receive; nothing was said by either party tending to show anything otherwise different.

Appellant also claims that the instructions given to the jury were erroneous, but it does not appear that any exceptions were taken thereto, and consequently no point is raised as to them. Judgment affirmed.

ANDERS, C. J., and STILES and HOYT, JJ., concur.

DUNBAR, J., dissents.

[No. 183. Decided June 17, 1891.]

VENDOME TURKISH BATH COMPANY V. C. F. SCHETTLER.

2	457
4	321
4	530
27*	76
30*	81
30*	645

MECHANICS' LIENS—FIXTURES.

There can be no lien obtained upon personal property not attached to a building so as to become a part of it, under the provisions of chapter 138, Code 1881, "relating to liens of mechanics and others upon real property."

*Appeal from Superior Court, King County.*

The facts are sufficiently stated in the opinion.

*Kilgen, Kelleher & Emory, for appellant.*

The opinion of the court was delivered by

SCOTT, J.—Appellant was a tenant occupying certain rooms in a building known as the "Kilgen Block," in the city of Seattle, and was conducting a bathing establishment therein. Appellee did some work for the appellant in the way of repairing, moving and refitting various steam and soil pipes, and in changing some of the other appliances used in carrying on said business, and furnished certain materials used in performing said work. Appellee's claim being disputed, he filed a notice of a lien purporting to cover

appellant's leasehold interest in said rooms, and the engine, boilers, machinery, water works, and all of the appliances used in said establishment, and sought to foreclose such lien in this action. Appellant claimed that the work was not performed and the materials were not used in the construction, alteration or repair of the building, or of any structure; that it was all done or used upon personal property not attached to the building, so as to become a part of it; and that no lien could be had thereon under such circumstances; and appellant moved for a nonsuit upon this ground when the appellee's case was closed. The court re-opened the case, to allow further proof by appellee of the nature and character of the work, and appellee introduced testimony in relation thereto, which, however, fully sustained appellant's claim that the things upon which the work was performed, and for which the materials were furnished, were all independent of the building, and there was no testimony or proof to the contrary. Nevertheless, the court rendered a judgment and decree for the plaintiff. A further point is made by appellant, that it was entitled to a trial by jury to ascertain the sum, if any, which it was owing, the amount claimed being disputed, and a trial by jury demanded.

That there can be no lien obtained upon personal property, under the provisions of chapter 138 of the Code of 1881, relating to "liens of mechanics and others upon real property," under which the lien here is claimed, we have, in effect, decided since this case was tried in the superior court—see *Kellogg v. Littell & Smythe Mfg. Co.*, 1 Wash. 407 (25 Pac. Rep. 461); and there was no law authorizing such a lien. There is nothing in the case of which equity could take cognizance, and appellant's points are well taken.

The case is reversed, and remanded to the court below, with instructions to dismiss the suit, without prejudice, however, to an action at law to recover the amount claimed.

ANDERS, C. J., and DUNBAR, HOYT, and STILES, JJ., concur.



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June, 1891.] Opinion of the Court—ANDERS, C. J.

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[No. 186. Decided June 17, 1891.]

## THE STATE INSURANCE COMPANY V. OTTO MEESMAN.

2	450
11	622
27*	77
40*	126

## FIRE INSURANCE—ACTION ON POLICY—LIMITATION AS TO TIME.

Where a policy of fire insurance provides that no action thereon "shall be sustained unless commenced within six months after the fire shall have occurred," the period of limitation begins to run from the date of the fire, although another clause of the policy may provide that "no loss shall become due and payable" until proof of loss is made, and examined into by the insurance company. (DUNBAR, J., dissents.)

*Appeal from Superior Court, Clarke County.*

The facts are fully stated in the opinion of the court.

*E. E. Coover*, and *R. & E. B. Williams & Carey*, for appellant.

*Gilbert & Snow*, for appellee.

The opinion of the court was delivered by

ANDERS, C. J.—This is an action upon a fire insurance policy issued by appellant to appellee to recover a loss amounting to \$221, alleged to have been sustained by appellee by reason of the destruction by fire of the property insured. The complaint was filed February 3, 1890, and service duly made. Defendant appeared and answered, setting up as a defense false representations made by plaintiff to defendant in his application for insurance, concerning his title to the land upon which the insured buildings were situated; and that, by the terms of the policy, action should be commenced thereon, if at all, within six months after the date of the fire. Plaintiff, in his reply, denied making any false representations, or that he knew any statements or representations contained in his said application were false or untrue; and alleged that at the time of making application for the policy of insurance he fully

and truly explained to the agent of the defendant who received said application the true nature of his right and title in and to said land; and that said agent thereafter filled out said application, and plaintiff signed the same in good faith, and relying upon and believing the statement of said agent then and there made to plaintiff that the said application was right and in proper form. Plaintiff further alleged that his loss was adjusted by and between himself and the defendant on the 8th day of August, 1889, at \$221. The issues having been thus joined, the case was tried by a jury, who returned a verdict in favor of the plaintiff for the sum claimed in the complaint. A motion for a new trial having been denied, judgment was entered in favor of the plaintiff and against defendant for the amount specified in the verdict. Defendant brings the case to this court for review, and seeks a reversal of the judgment for errors duly assigned.

Counsel for appellant contend that the action is barred by limitation fixed in the policy for bringing the action; and, in order to determine that question, it becomes necessary to examine the contract as made by the parties thereto. Among the provisions in the policy are the following:

“It is hereby expressly covenanted and agreed by the parties hereto that no suit or action against this company for the recovery of any claim under and by virtue of this policy shall be sustained in any court of law or chancery unless such suit or action shall be commenced within six months after the time the fire shall have occurred; and in case any such suit or action shall be commenced against this company after the expiration of the aforesaid six months, the lapse of time shall be taken and admitted as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

“All persons having a claim under this policy for loss or damage shall proceed at once to put the property saved or damaged in the best order possible, separating the damaged from the undamaged, and shall give immediate notice, and

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render a particular account thereof, in writing, to the company, stating the time, origin and circumstances of the fire, the occupancy of the building insured or containing the property insured at the time of the loss, the whole value and ownership of the property insured, and all encumbrances; all of which shall be verified by the affidavit of the assured and claimant. If required, the assured and claimant shall be examined and re-examined under oath by any person appointed by the company, at such time or times and place or places, in the county where the loss occurs, as the company or such persons may require, touching all questions relating to the claim, and shall subscribe to the same; and until such examination (if required) shall have been submitted to, subscribed and verified as herein specified, the company shall not be called upon to consider such claim or loss, nor shall the same become due and payable: . . . *Provided, further,* That it shall be optional with the company to repair, rebuild or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their intention so to do within sixty days after receipt of proofs herein required; and, in case the company elect to rebuild, the assured shall, if required, furnish plans and specifications of the buildings destroyed.

“In case of any differences of opinion as to the amount of loss or damage, such differences may be submitted to the judgment of two disinterested and competent men mutually chosen (who, in case of disagreement, shall select a third), whose award shall be conclusive and binding on both parties as to the amount only.”

The fire occurred on July 31, 1889. On August 8, 1889, the agents of the company went to the plaintiff to determine the amount of his loss. The plaintiff testified, “My loss was adjusted at \$221;” and this was not disputed by the agents themselves when called as witnesses on the part of the defendant. They did not agree that the loss would be paid, but at most, only promised to do the best they could for plaintiff. On August 13, 1889, however, the

secretary of the insurance company wrote a letter to the plaintiff, in which he said :

“We cannot see that you have any claim against this company for your loss, and must therefore decline to give the matter further consideration.”

As before stated, plaintiff commenced this action on February 3, 1890, which was six months and three days after the fire occurred. It is not claimed by counsel for appellee that the limitation of time expressed in the policy for the commencement of an action for the loss sustained is invalid, and, so far as we have been able to ascertain from an examination of adjudicated cases, such stipulations have been uniformly held valid and binding. But counsel contend that plaintiff could not have maintained an action against the company until August 13, 1889, at which time the company refused to pay the loss, and that the action was therefore commenced in time, although more than six months had elapsed since the happening of the fire. In other words, appellee claims that the time of limitation did not commence to run at the date of the fire, but at the time when the cause of action accrued, and that all of the provisions of the policy, taken together, warrant that construction. Numerous authorities are cited in support of appellee's contention. The decisions in these cases are based upon the assumption that the provision in the policy postponing a right of action until proof of loss is made, or until a certain number of days thereafter, is in conflict with the provision limiting the time within which an action may be commenced, and that these stipulations must therefore be harmonized by judicial construction. We cannot assent to this doctrine. The most careful reading of the provisions and stipulations in the policy now before us will fail to disclose any conflict therein. In the case at bar every stipulation in favor of the company

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June, 1891.] Opinion of the Court—ANDERS, C. J.

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was waived, excepting that providing for the proof of loss. After adjustment of the loss, and the waiver of all other conditions, appellee still had five and one-half months of the stipulated time remaining. No excuse or reason is given by him for his procrastination; and yet we are now called upon to sustain the action, notwithstanding the delay in bringing it until after the contract limitation had expired, upon the ground that the contract really means something different from what it says. The parties stipulated that no action upon the policy "shall be sustained unless commenced within six months after the time the fire shall have occurred," and that "the lapse of time shall be taken and admitted as conclusive evidence" against the validity of any claim against the company. This language is certainly plain and unambiguous. The other stipulations simply provide that no action shall be commenced until certain things therein specified shall have been done; and the evident meaning of the whole contract is that no action shall be commenced before the doing of these things, nor, in any event, after the lapse of six months. This construction gives full force and effect to every stipulation and provision in the policy, and does violence to none. But it is urged by counsel for appellee that, inasmuch as the company has secured itself against being sued immediately on the occurrence of the loss, it must be presumed not to have been the intention of the parties to suspend the remedy, and at the same time to provide for the running of the period of limitation. We are unable to perceive, however, how any such presumption can arise without, in effect, substituting another and different contract for the one made by the parties. It was but natural and reasonable for the insurance company to protect itself against the cost and annoyance of an action until it could have an opportunity to investigate the circumstances attending the fire by which the loss occurred, and ascertain its

liability, and determine whether to replace the property or pay the loss, or to refuse to pay it, if satisfied of the unjustness of the claim; and appellee, having consented to such a stipulation, should not now, in our opinion, be heard to object that the company thereby waived or extended the limitation of time for bringing an action. It is proper to remark, in passing, that this policy differs essentially in the provision respecting the limitation of actions from most, if not all, of those in controversy in the cases cited by appellee. In most of those cases a period of sixty days was reserved after proof of loss, before the expiration of which no action could be commenced. And in the leading case of *Steen v. Insurance Co.*, 89 N. Y. 315 (42 Am. Rep. 297), cited by appellee, DANFORTH, J., says:

“No doubt the appellant could have stipulated that the time of the fire should be looked to as the event from the happening of which the limitation should run, but it would require distinct language to show that such was the intention of the parties. It is not used here. It is found in *Schroeder v. Keystone Insurance Co.*, 2 Phila. 286, one of the cases cited by the appellant.”

In the policy before us we have almost identically the same “distinct language” that was used in the policy in the *Schroeder* case, and it is impossible to give it any different construction from the one there adopted. The following cases also support the view we take of this question: *King v. Watertown Fire Ins. Co.*, 47 Hun, 1; *Travelers’ Ins. Co. v. California Ins. Co.* (N. D.), 45 N. W. Rep. 703; *Bradley v. Phoenix Ins. Co.*, 28 Mo. App. 7; *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92 (33 Am. Rep. 47); *Fullam v. Ins. Co.*, 7 Gray, 61 (66 Am. Dec. 462); *Thompson v. Phoenix Ins. Co.*, 25 Fed. Rep. 296; *Ins. Co. v. Wells*, 83 Va. 736 (3 S. E. Rep. 349); *Tasker v. Ins. Co.*, 58 N. H. 469.

Holding, as we are constrained to do, that the action is barred by the lapse of time, it is not necessary to examine

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the other objections raised by appellant. The judgment of the court below is reversed, and the action dismissed.

SCOTT, HOYT, and STILES, JJ., concur.

DUNBAR, J. (*dissenting*).—I am unable to agree with the majority opinion in this case, either in its logic or its conclusion. Of course, if the provisions in regard to limitation were considered without reference to any other provisions in the policy, there is no room for construction, and this action would have been barred upon the 30th of July; but courts should not construe conditions in a contract as independent propositions segregated from the rest of the contract. This contract, like every other, must be construed with reference to all of its provisions, and especially must this provision be construed with reference to other provisions on the same subject. The subject of this provision is "limitation," or the time within which the company could be sued or could not be sued. But there is another provision in the policy—that the company shall not be liable after a fire occurs until an examination is made of the loss, at such time or times as the company may require. This provision in the policy is on the same subject as is the provision relied upon by appellants. It is the subject of limitation, and prescribes the time during which the company cannot be sued for the loss. And the two provisions must be construed together, and the intention of the contracting parties must be gathered, not from any one express condition, but from the whole contract. Let us look further at the provisions of this policy. The time within which this proof must be made is not limited, but the time shall be at such time as the company shall require, and the law will probably construe this to be a reasonable time. But there is another provision which gives the company sixty days more after the receipt of the proof to make up its mind whether it will rebuild or pay the money. During

this sixty days additional the company cannot be sued, and if at the end of that time it concludes not to pay at all, probably one-half of the time allowed the insured has expired. And as the fallacy of a position is best shown by distorting it, I will presume that two more provisions granting additional time to the company are injected by them into the policy, and the time of the insured in which to seek his remedy shall be exhausted, and yet the language of the first provision in reference to the six months limitation is perfectly plain and unambiguous.

The general rule in regard to limitation is, that it does not begin to run until after the right of action accrues. The very essence and central idea of the law is, that the party shall have the right during all the time within the statute to bring his action, and, if anything occurs to prevent the exercise of this right, the statute in the mean time is not running. It is true that this is so by provision of the statute, but it is a provision so common, so generally understood, and so universally acted upon, that parties may well be supposed to have contracted for a shorter limitation with reference to conditions universally surrounding and attaching to statutes of limitation. The provision limiting the right of action to six months is inserted for the special benefit of the company. It is a restriction of the legal rights of the insured; and, if there are any doubts as to its proper import, those doubts should be resolved most strongly in favor of the insured, against whom it was intended to operate. *Ames v. Insurance Co.*, 14 N. Y. 253; *Mayor, etc., v. Insurance Co.*, 39 N. Y. 45 (100 Am. Dec. 400); *Hay v. Insurance Co.*, 77 N. Y. 235; *Steen v. Insurance Co.*, 89 N. Y. 315 (42 Am. Rep. 297); *Chandler v. Insurance Co.*, 21 Minn. 85 (18 Am. Rep. 385); *Killips v. Insurance Co.*, 28 Wis. 472 (9 Am. Rep. 506); *Martin v. Insurance Co.*, 44 N. J. Law, 485 (43 Am. Rep. 397); *Ellis v. Insurance Co.*, 64 Iowa, 507; (20 N. W. Rep. 782); *Vette v. Insurance Co.*, 30 Fed. Rep. 668. It is true that in many of the cases cited the



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language of the provision is "within six months [or twelve months, as the case may be] after the loss shall have occurred," but those cases cannot be distinguished in principle from those where the language employed is "six months from the time of the fire." The time of the fire is the time of the loss, as a matter of course, and it is idle to multiply words in trying to show a difference where it does not exist. It is true the court in *Steen v. Insurance Co.*, 89 N. Y. 315 (42 Am. Rep. 297), undertook incidentally to distinguish the language, but the attempt was a failure, and the courts generally, in holding in favor of the view urged by appellee, have placed their decisions squarely upon the ground that all the conditions of the policy must be construed together, and that, construing them together, the intention was gathered that the limitation did not begin to run at the date of the loss, but at the time when the right to sue accrued. In *Vette v. Insurance Co.*, cited above, the court says:

"But when does the period of limitation begin to run, in view of other stipulations in the policy? It would seem reasonable to so construe the stipulation as to give the insured the full term of six months in which to sue after the right to sue has accrued; and this, I think, was the intent of the parties to the contract. The loss is not payable until sixty days after proofs are furnished, and by a further provision the assured is deprived of his right to sue until an award has been made, fixing the amount of the claim. In the mean time, according to defendant's theory, the limitation prescribed by the policy is running against the demand, and barring plaintiff of his remedy, although the time has not arrived when it is possible for him to maintain an action. Ordinarily a statute of limitations does not begin to run until a right of action has accrued—that is to say, until the plaintiff has full liberty to sue if he is so inclined; and I see no good reason for construing the special statute of limitations imported into this contract in such way as to make it operative during a period when by virtue of other stipulations of the contract the right of action is suspended."

To the same effect is *Spare v. Insurance Co.*, 17 Fed. Rep. 568; *Chandler v. Insurance Co.*, 21 Minn. 85 (18 Am. Rep. 385); *Mayor, etc., v. Insurance Co.*, 39 N. Y. 45 (100 Am. Dec. 400); *Ellis v. Insurance Co.*, 64 Iowa, 507 (20 N. W. Rep. 782); *Miller v. Insurance Co.*, 70 Iowa, 704 (29 N. W. Rep. 411); *Hay v. Insurance Co.*, 77 N. Y. 235; *Barber v. Insurance Co.*, 16 W. Va. 658 (37 Am. Rep. 800); 2 May, Ins., § 479; *Mix v. Insurance Co.*, 9 Hun, 397; *Killips v. Insurance Co.*, 28 Wis. 472 (9 Am. Rep. 506); *Murdock v. Insurance Co.*, 33 W. Va. 407 (10 S. E. Rep. 777). In *Friezen v. Insurance Co.*, 30 Fed. Rep. 352, the policy provided, just as this one does, that the action to recover upon the policy should be commenced within six months after the fire occurred, with similar provisions with regard to the time of payment, and the court held that these provisions should all be construed together, and the six months limitation be reckoned, not from the occurrence of the fire, but from the time the loss was due and payable. "In any other construction," said the court, "the insured's right of action might be barred before it had occurred." Also in *Case v. Insurance Co.*, 83 Cal. 473 (23 Pac. Rep. 534), the provision is that there shall be no recovery unless suit or action shall be commenced within twelve months next after the fire, and provides also that no suit shall be commenced until after the loss is appraised. It was held that the limitation did not run from the time of the fire, but from the time the right of action accrued. Other courts, notably *Johnson v. Insurance Co.*, 91 Ill. 92 (33 Am. Rep. 47); *Glass v. Walker*, 66 Mo. 32; *Fullam v. Insurance Co.*, 7 Gray, 61 (66 Am. Dec. 462); *Bradley v. Insurance Co.*, 28 Mo. App. 7—have held that the letter of the limitation clause must govern, and that the period begins from the loss; but I think that the contention of the appellee is based both on the weight of authority and right reasoning. The courts must construe the contract so as to give force to all its provisions, if possible, and make them all operative and harmonious. It

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was the evident intention of the contracting parties that the statutory time of limitation should be shortened to six months, and that six months should be substituted instead of six years, as it would be under the law. Under that provision, standing by itself, the insured would have had six months from the date of the fire during any time of which he could have brought his action to recover his loss. But the company, for its own protection, imposed other conditions having indirect reference to and modifying the provisions giving the party the right to sue any time within the six months; so that it will be seen that, even for the benefit of the company, the subsequent condition of immunity from suit for a certain time must have been made with reference to the first provision in relation to the limitation, and this provision must not be construed relatively in favor of the interests of one party and independently against the interests of the other. It seems plain to me that the provisions depend one upon the other, and must be construed together; that the parties understood that the company was not to be harassed with a suit until it had had ample opportunity to adjust the loss; and that the insured was to have the benefit not of three months, or of four months, but of six months, to bring his action.

On the proposition that Meesman made misrepresentations in his application in regard to the ownership of the land, that question was raised by the pleadings, and went to the jury, and the jury found for plaintiff under the instructions of the court, which correctly stated the law. It was not a question of varying a written contract by parol testimony; it was simply a question of whether the insured or the agent of the company was responsible for certain answers to certain questions in the application. One or two other points were made, but they are of trifling importance; and, even if errors were made, it was evidently without prejudice, and would not justify a reversal of the case. I think the judgment should be affirmed.

[No. 242. Decided June 18, 1891.]

THE STATE OF WASHINGTON, *on the Relation of Otto Quade*, v. FRANK ALLYN, *Judge of the Superior Court of Pierce County.*

APPEAL — STATEMENT OF FACTS — DUTY OF TRIAL JUDGE — EXHIBITS IN EQUITY CASES.

It is the duty of the judge who tries a case, when required, "to settle between the parties what is the proper statement, and to certify the same;" and it is not a sufficient excuse for not settling and certifying a statement of facts, to say that the transcript of the evidence is held by a stenographer for the purpose of securing his fees, when such transcript has already been filed in the cause and subsequently withdrawn from the files with the judge's permission.

In causes of equitable cognizance, the original exhibits should be sent up on appeal, and not copies thereof.

*Original Application for Mandamus.*

*H. W. Lueders*, for relator.

When the superior judge refuses to perform his duty in signing or settling a statement of facts or bill of exceptions regularly tendered him for that purpose, or to adjourn the settlement thereof, or to order the same to be restored to the files of the court when wrongfully taken away by a stranger to the record, the supreme court has jurisdiction to compel him to perform his duty and exercise his discretion by means of a writ of *mandamus*. See Code Wash., §§ 689–691, and 693; Sess. Laws 1889–90, § 6, p. 322; Const., art. 4, § 4. The writ of *mandamus* in this case is necessary and proper, because the relief asked is necessary and proper to the complete exercise of the appellate and revisory jurisdiction of the supreme court in the premises; and there is no other speedy and adequate remedy by which the relief can be obtained. See *State v. Murphy*, 19 Nev. 89–97 (6 Pac. Rep. 840), and authorities there

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Argument of Counsel.

cited; *Railway Co. v. Lane*, 79 Tex. 643 (16 S. W. Rep. 18; *Swartz v. Nash*, 45 Kan. 341 (25 Pac. Rep. 873); *U. S. v. Windom*, 137 U. S. 638 (11 Sup. Ct. Rep. 197); *Reichenbach v. Ruddach*, 121 Pa. St. 18 (15 Atl. Rep. 488); *Com. v. McLaughlin*, 120 Pa. St. 518 (14 Atl. Rep. 377); *Careaga v. Fernald*, 66 Cal. 351 (5 Pac. Rep. 615); *State v. Slick*, 86 Ind. 501; *State v. Hawes*, 43 Ohio St. 16 (1 N. E. Rep. 1); *Alderson v. Commissioners*, 31 W. Va. 633 (8 S. E. Rep. 274). It is the statutory duty of the superior court judge who tried the cause to sign and settle between the parties the bill of exceptions or statement of facts; and, if contested or controverted, it is his duty to determine the correctness thereof, and to settle the controversy, and to certify the same. Laws 1889-90, p. 334, §§ 4-6. And such power to settle statements of facts or bill of exceptions seems to be solely vested, in the first instance, in the judge who tried the cause. *Id.*, p. 335, §§ 8, 11. And the supreme court, by virtue of said act (§ 7), seems to be authorized only to allow amendments and additions thereto on suggestion of diminution of the record to supply omitted portions of the record under appropriate rules. See *Swartz v. Nash*, 45 Kan. 341 (25 Pac. Rep. 873). SIMPSON, Commissioner, says under a similar statute:

“It is made the statutory duty of a court to settle and sign a bill of exceptions. If the bill is not a true one the court should correct it, or suggest the correction to be made. We hold it to have been the plain duty of the contest court in this case, when the bill of exceptions was presented to it, to have correctly settled and signed it. If the bill as provided was defective in any respect, the defect should have been remedied then and there. It is a clear legal right, belonging to any party, when a case is decided against him, to have a bill of exceptions settled and signed by the court, and it amounts to an absolute denial of a legal right and of justice for a trial court to arbitrarily refuse to settle a true bill of exceptions.”

In *Poteet v. Commissioners*, 30 W. Va. 58 (3 S. E. Rep. 97); *Morgan v. Fleming*, 24 W. Va. 186, the supreme court of West Virginia says:

“When a bill of exceptions is presented to the court to settle and sign, the court should carefully examine the bill of exceptions, and, if any of the statements are incorrect, he should correct them; and, upon his refusal, *mandamus* will lie to compel him to do so.”

See, also, *State v. Field*, 37 Mo. App. 83; *Hawes v. People*, 129 Ill. 123 (21 N. E. Rep. 777); *State v. Murphy*, 19 Nev. 89-97 (6 Pac. Rep. 840). Settling and signing a statement of facts is a ministerial and not a judicial act. *Flourney v. Jeffersonville*, 17 Ind. 173 (79 Am. Dec. 468). This is true, because the jurisdiction in the cause appealed is, by virtue of the appeal, vested in the supreme court; and it remains only as a matter of duty that the judge who tried the cause should verify the record of his judgment and proceedings before him, and send the same to the appellate tribunal for review. There is no discretion to be exercised on the part of the trial judge; he merely certifies the true facts of the proceedings had and the matters which transpired before him during the pendency and the trial of the cause, according to his best recollection, and there his duty ends; and this duty is imposed upon him by statute, and cannot be avoided by him; and his certificate, as to verity, is not absolutely conclusive, though *prima facie* sufficient. *Givens v. Bradley*, 3 Bibb, 192 (6 Am. Dec. 646); *Taylor v. Gillette*, 52 Conn. 216.

The opinion of the court was delivered by

ANDERS, C. J.—On May 25, 1891, upon motion of the relator, supported by affidavits, an alternative writ of mandate was duly issued out of this court directed to the respondent, commanding him immediately after the receipt of said writ to order the time for settling a statement of facts in a certain cause tried before the respondent as judge

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June, 1891.] Opinion of the Court—ANDERS, C. J.

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of said superior court, wherein Warren & Hines were plaintiffs and Otto Quade and D. S. Moore & Co. were defendants, to be adjourned to a certain day, as required by law, and to forthwith cause to be restored to the files of said superior court the transcript and evidence which were filed in said cause, with a statement of facts attached thereto as part thereof, on the 20th day of February, 1891, which, as appeared by the affidavit on behalf of the relator, had been allowed to be segregated and taken from the files of said court by the respondent, and to forthwith sign, settle and certify the statement of facts filed in said cause by the relator in accordance with the true facts in the premises, or to show cause before this court, at the court-room thereof, in the state capitol at the city of Olympia, State of Washington, on Monday the 1st day of June, 1891, at the opening of the court on that day, why he had not so done. On the return day of the writ the respondent did not appear, either in person or by attorney, but filed his return in writing, wherein he states his reasons why he has not complied with the commands of the writ. The relator objects to the return on the ground of insufficiency, and moves the court to issue a peremptory mandate. The substantive portion of the respondent's answer and return is as follows:

“He returns herewith the affidavit of C. B. Eaton, stenographer in the case of *Warren & Hines, plaintiffs, v. Otto Quade et al.*, which he asks to have made a part of this answer, as if copied in full herein. From said affidavit and this answer your honors will see the trouble arises only because of the refusal of Otto Quade or his attorney to fully pay the legal fees of a stenographer for his work, the stenographer therefore retaining the work to secure twelve dollars due to him. For further answer respondent says the judge of this court could not properly attach his certificate to a paper as containing all the testimony on which the case was tried below, in the absence of the report of the stenographer in an equitable cause like this, as, under

the act of March 22, 1890, entitled 'An act for the removal of causes from the superior to the supreme court,' all the testimony was required to be and was taken down by the stenographer, and no notes or memorandums were preserved save those taken down by the stenographer, this cause being one of equitable cognizance, as stated. The attention of the supreme court is called to § 5 of said act of March 22, 1890, found at page 333 of the Session Laws of 1889-90, as follows: 'Sec. 5. The certificate of the judge that said statement contains all the material facts in the cause or proceeding shall be sufficient. In causes of equitable cognizance, where the appeal is from the final judgment, the said statement of facts shall contain all the testimony on which the cause was tried below, together with any exceptions or objections taken to the reception or rejection of testimony.' This being a case of equitable cognizance, and the evidence having been taken by a stenographer as contemplated by § 5, above quoted, and having been preserved in no other way, by notes or memorandums taken by any other person which were reliable, it will readily be seen that it would be impracticable for this court to certify to anything as the evidence in the cause, except the report or transcript of the stenographer. This report is shown by the affidavit of the stenographer to be in his hands, and properly held by him, for the purpose of securing his fees for doing the work. The transcript is not before this court, and cannot be certified to by this court until the usual and customary course is pursued by the relator of paying (as he should have done in the first place) the proper fees of the stenographer, obtaining the report, and presenting it to this court for certification. When that is done the court will be pleased to certify it in the customary way, and cannot make any further return than herein stated and shown by the affidavit of the stenographer hereto attached as part of this answer."

It will be seen by an examination of this return that the main reason alleged for not settling and signing the statement of facts as required by the alternative writ is because the "transcript is not before this court, and cannot be certified to by this court until the usual and customary course



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is pursued by the relator of paying (as he should have done in the first place) the proper fees of the stenographer, obtaining his report, and presenting it to this court for certification." But the law clearly makes it the duty of the judge who tries a case "to settle between the parties what is the proper statement, and to certify the same." The judge is presumed to know what the facts are in every case tried before him, and it is no sufficient reason or excuse for not settling and certifying a statement of facts to say that the transcript of the evidence is in the hands of a stenographer, and "properly held by him for the purpose of securing his fees for doing the work." How properly held? It is alleged in relator's affidavit, and is not disputed by the respondent, that a transcript of the testimony was filed in the cause, and was subsequently permitted to be taken and segregated from the files by the respondent. This being true, it must still be treated as being under his control, and we see no reason why the court could not order and compel its restoration to the custody of the clerk with whom it was filed, if deemed necessary by the judge to the discharge of his official duty. The stenographer in this case is not an officer of the court, and, even if he were, he would have no right to withhold any of its records or papers from the proper custodian thereof. By going into court at its request or by its permission, and writing down the testimony in the cause, he became the hand and servant of the court, and it would be announcing a strange doctrine indeed to say that he had a right by virtue of a supposed lien, to take and retain the testimony thus preserved after the same had been filed in the cause.

There seems to be some controversy in this proceeding concerning copies of exhibits introduced in evidence at the trial, and which the relator desires to embody in his statement of facts; and we will state here, for the benefit of the parties and of the bar generally, that in causes of equitable

Statement of the Case.

[2 Wash.]

cognizance the original exhibits should be sent up on appeal, and not copies thereof. This we believe to be the law, and this court has uniformly so held. It is the absolute legal right of the relator to have a complete record of his case brought to this court, in order that justice may be done between the parties. A statement of facts is necessary to a full and complete record. The respondent refused to settle, sign and certify the one presented by counsel for relator on the ground that it did not speak the truth, but at the same time refused to correct it so as to make it conform to the real facts in the case, as it was his duty to do, because, as it appears, it was not a statement which had been certified by the stenographer. The return is manifestly insufficient upon its face. Let the peremptory writ issue.

HOYT, STILES, DUNBAR, and SCOTT, JJ., concur.

2	476
5	101
27*	76—
31*	494
2	476
80	151

[No. 176. Decided June 19, 1891.]

GEORGE W. VAIL v. CHARLES TILLMAN *et al.*

SPECIFIC PERFORMANCE—CONTRACT—MUTUAL MISTAKE—  
PLEADING.

A complaint for specific performance of a contract to convey certain land which sets out a written memorandum thereof, indefinite and defective in the elements necessary to a perfect contract, and alleges that by mutual mistake of the parties thereto the contract agreed to and which was intended to have been embodied in said writing, provided for the sale of "one acre, to be taken in a square form out of the northwest corner" of a certain lot, for which the buyer was to pay "one dollar in cash at this date, and ninety-nine dollars nine months from date," is sufficient on demurrer.

*Appeal from Superior Court, Clallam County.*

Action by George W. Vail against Charles Tillman, in his own right, Charles Tillman, as administrator of the es-

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June, 1891.]Opinion of the Court — HOYT, J.

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tate of Laura M. Tillman, deceased, Walter Tillman, Burt Tillman, Howard Tillman, and Cora Tillman, minors, for specific performance of a contract to convey lands. A demurrer to the complaint was sustained, and plaintiff appeals.

*Finch, Snook & Glasgow*, for appellant.

The opinion of the court was delivered by

HOYT, J.—Appellant by his complaint filed in the lower court sought to secure the specific performance of a contract for the purchase of certain lands therein described. The memorandum of the contract, reduced to writing, and signed by the appellees, was as follows:

“This is to certify that we have this day sold to George W. Vail the following acre of land, to wit: Off of the northwest corner of suburban lot or block thirty-one (31), located on the town site established by the U. S. government at Port Angeles, Washington Territory, for which we agree to make a warranty deed to George W. Vail and his heirs at our earliest convenience, and for which George W. Vail is to give his note, payable nine months from date, and a mortgage on the land purchased to secure the payment of the note.”

The complaint alleged that after the making of said contract the appellees put the appellant in possession of the land in question; that appellant, with the knowledge and consent of appellees, had fenced the same, and made certain improvements thereon, and was still in the open possession thereof. It will be seen, by an examination of said memorandum, that some of the elements necessary to a perfect contract are omitted, but I am inclined to the opinion that such omissions are not sufficient to invalidate said contract, when taken in connection with such possession and improvements as the complaint alleges on the part of the appellant. But, be this as it may, the allegations of the

complaint sufficiently show that the omissions in said memorandum occurred through the mutual mistake of the parties thereto, and that the contract which was in fact agreed to by the parties, and which was intended to have been embodied in said writing, was as follows:

“This is to certify that we have this day sold to George W. Vail the following acre of land, to wit, one acre, to be taken in a square form out of the northwest corner of suburban lot thirty-one (31), located in the town site established by the United States government at Port Angeles, Washington Territory, for which we agree to make a general warranty deed at our earliest convenience, and for which George W. Vail is to pay us one hundred dollars, as follows: One dollar in cash at this date, and ninety-nine dollars nine months from date, with ten per centum per annum interest from date; and the said George W. Vail agrees to give us his note for said deferred payment, and to secure the payment of said note by a first mortgage on the said premises.”

I think the memorandum thus intended to have been executed is clearly within the principles of the case of *Lan- gert v. Ross*, 1 Wash. 250 (24 Pac. Rep. 443), and must therefore be held to be sufficient. The demurrer to the complaint, of course, admitted all the allegations as to mistake, possession, etc., and, as the contract alleged to have been the contract of the parties as intended by them is sufficient, it follows that the demurrer to the complaint should have been overruled; and that, for the error of the court in sustaining it, the judgment must be reversed, and the cause remanded to the court with instructions to overrule the demurrer, and proceed in said action in accordance with the principles of this opinion.

ANDERS, C. J., and STILES, SCOTT, and DUNBAR, JJ., concur.

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Opinion of the Court—HOYT, J.

[No. 260. Decided June 19, 1891.]

2 479  
3 156

W. C. P. McGOVERN v. JAMES C. FAIRCHILD, *Treasurer of Pierce County.*

## SCHOOL DISTRICTS—EXTENSION OF CITY LIMITS.

Under the Laws 1889-90, p. 386, §§ 1 and 2, cities of more than ten thousand inhabitants can, by an extension of their city limits, embrace other and independent school districts, and by such extension prematurely end the official terms of the school officers of the districts or parts of districts so brought into the extended city limits.

In such cases, upon the annexation of additional territory, it all becomes merged in the school district comprising the city, and, the officers of the district so annexed at once ceasing to hold office, the enlarged district becomes subject to the control of the board of education of said city as constituted before such enlargement.

*Certified from Superior Court, Pierce County.*

Application by W. C. P. McGovern to the superior court of Pierce county for a writ of mandate to compel James C. Fairchild, county treasurer, to pay certain school warrants authorized by the school directors of a certain district which had been included within the city limits of Tacoma by a recent extension thereof. The court granted a peremptory writ, and certified certain questions to the supreme court for its opinion thereon.

*O'Brien & Hedger*, for plaintiff.

*W. H. Snell*, Prosecuting Attorney, and *Charles Bedford*, for defendant.

The opinion of the court was delivered by

HOYT, J.—This was a *mandamus* proceeding to compel the county treasurer of Pierce county, as *ex officio* treasurer of school district No. 60, to pay a certain school warrant purporting to be issued by the directors of said

district. The court below granted a peremptory writ, and in so doing certified to this court certain questions of law which in the opinion of the court were involved therein, and were of such importance that the opinion of this court should be had thereon. These questions, as stated by said judge, are as follows:

“In cities of more than ten thousand inhabitants, can the city limits be extended and embrace within its extended limits other school districts which before were entirely independent districts, with board of directors and other officers, and by such extension (when completed as required by law) abolish and prematurely end the official terms of such school trustees or directors and clerks, in the district or parts of districts so brought in?

“Or shall such directors and officers continue to serve until their term expires as a part of an enlarged board of education, consisting of the old board and all those residing in the extended limits?

“Or shall such districts continue as separate and independent districts, notwithstanding such extension of the city limits?

“What power has the old board of education of the city district to bind the enlarged district, or to control the funds and property of the said outlying districts?”

It will be seen by the questions thus submitted to this court for decision that this controversy grows out of complications arising by reason of the annexation of certain outlying territory to the city of Tacoma, and its effect upon outside school districts included in the limits so annexed to the said city. The learned judge of the court below was of the opinion that all such territory, when annexed to said city, became a part of school district No. 10, comprising the city of Tacoma, and with this position I am entirely content, as I think it clearly warranted by the statutes relating to that subject. The judge of the court below was of the further opinion that, although said enlarged city comprises but one school district, yet, under the provisions of § 2 of

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Opinion of the Court—Hoyt, J.

the act of 1889-90, relating to school districts in cities of more than 10,000 inhabitants, the directors of the districts which were before the enlargement of the city limits outside of the same would continue in office, after being included therein, until their full term of office expired, and would become members of the board of education of said city, and that, until there had been an organization of the new board as thus enlarged, the old boards of the outlying districts should continue to act therefor. Appellant contends that this conclusion of the learned judge is erroneous, and with this contention I agree. In my opinion, the proviso to said § 2, upon which the learned judge below seems to have founded his opinion, has no relation to the question of territory annexed to a city, as shown by the facts in this case. The only office of that proviso was to provide for the first organization of districts in cities of more than 10,000 inhabitants which theretofore had comprised more than one district. Such district once formed, and its board of directors organized, such proviso, so far as that city was concerned, no longer had force. I am of the opinion that so soon as said territory was annexed, it all became merged in the school district comprising the city, and that the officers of the district so annexed at once ceased to hold office, and that the enlarged district became subject to the control of the board of education of said city, as constituted before such enlargement. We therefore answer the first clause of the questions submitted in the affirmative; the second and third in the negative; and as to the fourth clause we say that the old board has plenary power as to the subjects therein enumerated. It follows that the action of the court in granting a peremptory writ of *mandamus* must be reversed, and the cause remanded, with instructions to deny the writ.

ANDERS, C. J., and SCOTT, STILES, and DUNBAR, JJ.,  
concur.

[No. 181. Decided June 22, 1891.]

WILLIAM JOHNSON AND C. F. MILLER v. W. M.  
MAXWELL.

NUISANCE — ABATEMENT — EQUITY — PLEADING — APPEAL — MOTION  
FOR NEW TRIAL.

Under Code 1881, § 450, the supreme court may review and reverse on appeal any judgment of the superior court, although no motion for a new trial was made in such court.

Under Code 1881, § 103, providing that every material allegation of new matter in the answer not controverted by the reply shall, for the purpose of the action, be taken as true, it is error for the trial court to treat affirmative matter in the answer as denied, and permit testimony to be given accordingly.

The obstructing of a public road by building a fence therein is a nuisance which may be abated by any person injuriously affected thereby, provided it be done without committing a breach of the peace, or doing unnecessary injury.

Where plaintiff, in violation of law, places and maintains his fence upon a public highway, a court of equity will not grant him relief by injunction against parties destroying or threatening to destroy such fence.

*Appeal from Superior Court, King County.*

The facts are fully stated in the opinion.

*Howe & Corson*, for appellants.

*McClure & Wheeler*, and *Lewis & Gilman*, for appellee.

The opinion of the court was delivered by

ANDERS, C. J.—Appellee moves the court to dismiss this appeal and to affirm the judgment of the court below for the reason that no motion was made for a new trial, and there appears no order, judgment or decision made appealable to this court. No argument was made in support of the motion, and no authorities cited; but our attention is called to §§ 446 and 449 of the code, as sustaining the contention of appellee. These sections are not appli-

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88	655
2	482
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June, 1891.] Opinion of the Court — ANDERS, C. J.

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cable to this case. This appeal is from a final decree in the cause, and § 450 of the code provides that the supreme court may review and reverse, on appeal, any judgment of the lower court, although no motion for a new trial was made in such court. The motion to dismiss must therefore be denied.

This action was brought by appellee, who was plaintiff below, to perpetually restrain and enjoin appellants from entering upon plaintiff's land for the purpose of grading and constructing any road or roads thereon, and from tearing down or removing any part of plaintiff's fences on said land. The defendants in their answer admitted that they went upon the land described in the complaint, removed plaintiff's fence, and did some grading for the purpose of making a roadway thereon, but alleged by way of avoidance that the *locus in quo* was a public road, and that the acts complained of were done wholly within the limits thereof; that before grading said road or removing the fence, they requested plaintiff to remove the said fence, which he refused to do; that they were accustomed to pass along said public road, and that it constituted their only convenience for traveling to and from defendant Johnson's farm to Maple Valley, and that the said fence so obstructed the said public road that the defendants could not pass along the same. No reply was filed by plaintiff to the affirmative allegations of the answer, and on the trial counsel for defendants claimed that those allegations were thereby admitted to be true. The court ruled otherwise, and treated the affirmative matter as denied, and permitted testimony to be given accordingly. This was in direct contravention of § 103 of the code, which provides that every material allegation of new matter in the answer, not controverted by the reply, shall, for the purpose of the action, be taken as true, and was error.

After hearing the testimony in the cause, the court made

its findings of fact and conclusions of law, and thereupon rendered a decree in favor of plaintiff, perpetually enjoining and restraining the defendants, and each of them, and each of their servants, agents and employés, from tearing down, removing or in any wise interfering with or molesting the fence of plaintiff along the public road leading from the farm of defendant William Johnson to Maple Valley, King county, Washington, unless they shall be thereunto authorized by the board of county commissioners of said King county, and that in the mean time the plaintiff straighten the fence in accordance with the findings of the court, and that plaintiff have and recover from the defendants his costs and disbursements taxed at one hundred and four and 95-100 dollars. The defendants appealed, and the cause is now here for trial *de novo*.

The trial court found in substance, as facts, from the evidence, that the road in controversy was a public road leading from the farm of appellant Johnson, on the south of appellee's land, to the town of Maple Valley on the north, and that it was located by order of the board of county commissioners of King county, and was and is thirty feet in width; that the plaintiff encroached upon said road for the distance of thirty-two rods along the west side thereof, by placing his fence thereon, but that the encroachment upon the said road by plaintiff's said fence did not hinder, impede or delay travel upon said road, nor render the same less convenient for public use; and that on the 27th day of August, 1890, the defendants tore down and removed plaintiff's fence for the distance of thirty-two rods where it encroached upon the west side of said road, and that the defendants have threatened to continue to tear down said fence, and that plaintiff has good reason to fear that they will do so.

Appellants contend that the fence in question encumbered, tended to obstruct and did obstruct a public road,

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June, 1891.] Opinion of the Court — ANDERS, C. J.

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and was, therefore, a public nuisance both by statute and the common law, and that they were specially inconvenienced and damaged thereby, and that they therefore had a right to remove it, after the plaintiff had himself refused to do so. We think the position well taken. Our statute makes the doing of an act which unlawfully interferes with, obstructs or tends to obstruct any public street or highway, a nuisance. See code, § 1235. And it is especially declared that the obstructing or encumbering by fences, buildings, or otherwise, the public highways, private ways, streets or alleys, are nuisances, and that any person may abate a public nuisance which is especially injurious to him by removing, or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury. See code, §§ 1245, 1246.

While this road is a public highway, it seems that it was established according to law primarily for the benefit and at the expense of appellant Johnson, whose land was so situated that it had no connection with any county road. Miller was a tenant of Johnson, and resided on his farm; and, from the circumstances of their situation, they both had an interest in the road different from that of the general public. It was their only means of ingress to, or egress from, their place of residence, and any encumbrance or obstruction thereon which interfered with their free passage along the same in any manner which their business might require, worked a special inconvenience and damage to them.

We think it is abundantly shown by the evidence that appellee's fence was situated within the limits of the road, and that at one point, at least, it extended up to, if not beyond, the center of the highway, and that at that particular place but a few feet of space intervened between the fence and the sloping bank of a creek, along which appel-

lants, in going to and from their place of residence, were compelled to travel, or to go into the bed of the stream, by reason of the location of the fence, and that it was difficult, if not impossible, to pass along that portion of the way with wagons carrying ordinary loads. Johnson testified that he was unable to haul lumber over the road, as it then was, to fix his house, and was compelled to remove the fence in order to do so. If that is true, and it does not appear to be successfully contradicted, the obstruction was certainly injurious to him, and he was justified in abating it "without committing a breach of the peace, or doing unnecessary injury." If appellants thereby did unnecessary injury, they are liable therefor in damages. Whether unnecessary injury was done to appellee's property by the acts of appellants, is a question which we are not now called upon to decide; nor do we deem it important in this action.

In no view of this case, as it appears to us, can the judgment of the lower court be sustained. Appellee, in violation of law, placed and maintained his fence upon a public highway, every portion of which appellants, and the public generally, had a right to use for the purposes of travel. He replaced the fence after it was removed. It was in the highway at the time of the trial, and for aught we know he still maintains it there, straightened though it may be, at one point, by order of the court. It is not the province of a court of equity to protect an individual in the violation of law, and it will be time enough for appellee to receive its aid when he ceases to be a wrong-doer himself.

The judgment of the court below is reversed, and the cause remanded, with directions to dismiss the complaint.

DUNBAR, SCOTT, HOYT, and STILES, JJ., concur.

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June, 1891.] Opinion of the Court—SCOTT, J.

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[No. 162. Decided June 24, 1891.]

**WILLIAM MOONEY v. THE STATE OF WASHINGTON.**

**APPEAL—STATEMENT OF FACTS—NOTICE OF SETTLEMENT—  
PRESUMPTION.**

Where the record on appeal does not disclose that notice of settlement of the statement of facts included therein was given appellee, nor that there was a waiver thereof, and there is no appearance by appellee in this court, the purported statement will be disregarded. The notice required to be given the opposite party for the settlement of a statement on appeal is jurisdictional, and there can be no presumption in favor of its having been given, or waived.

*Appeal from Superior Court, King County.*

The facts are fully stated in the opinion.

*T. M. McNamara*, for appellant.

The opinion of the court was delivered by

SCOTT, J.—Defendant was convicted of the crime of burglary, and he appealed to this court. No brief was filed or appearance made here for the state. The questions sought to be raised on the appeal only appear by a purported statement of the facts. The record does not show that any notice was given that a statement would be settled, or that any one appeared at the settlement for the respondent; and there being no appearance in this court by the state, this question, if material, is not waived. It is argued that we must presume, in the absence of any showing to the contrary, that a proper notice thereof was given; that notice of an appeal having been given, a presumption in favor of the regularity of all the subsequent proceedings therein arises. In most matters this would be true, but the notice required to be given to the opposite party for the settlement of a statement should be held to

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28*	363
35*	126

be jurisdictional so far as the statement is concerned. Appellant, of course, can take advantage of such matters on appeal as are shown by the record without a statement, and of these the respondent would be notified by the appeal notice, but he would have a right to presume that nothing else would be raised unless he had other and further notice thereof as provided for by the act in relation to appeals. A party might not desire to be heard to resist any questions presented by the record, in the absence of a statement of facts or bill of exceptions, and a settlement of either of these is in the nature of an independent proceeding in the prosecution of an appeal where the appellant undertakes to preserve other points raised below that would not appear by the record otherwise, and, it being in a measure an independent, auxiliary proceeding not necessarily an incident of an appeal, the notice therefor is jurisdictional, and there can be no presumption in favor of its having been given. Where the notice is given, or if waived below, the fact should be preserved, and made to appear sufficiently in some form. There was no request to supply the proof, or offer to show that the notice was in fact given in this case. Certainly a judge of the superior court ought not to, and probably would not, proceed to settle a statement where no such notice was given, and where this was not waived. But it is a matter that pertains to the jurisdiction of this court, so far as the statement is involved, and an attempt might have been made to give such a notice which we, possibly, differing from the superior judge, might hold insufficient, and in fact no notice. We should be informed of what was done in this respect, so that we may know whether the respondent has had sufficient notice to put him upon his guard as to the points presented in the statement, where he makes no appearance here; this would be a question for us to finally pass upon.

In accordance with this, there being no question raised,

June, 1891.]

Opinion of the Court—SCOTT, J.

the judgment should be affirmed; but as it is a criminal case, and the first one wherein there was no appearance for the respondent, and where such a notice as is spoken of under like circumstances was not shown, we will examine the only point presented by the purported statement which is supported by an exception, and that is, that the evidence was not sufficient to sustain the conviction. The testimony shows that a building occupied as a saloon was broken into in the night time and the money draw, containing some fourteen or fifteen dollars in silver, a considerable part thereof being small change, and including two half dollars and three quarters in Canadian money, was robbed. That the defendant was seen by a police officer about two o'clock in the morning coming out of an alley which ran along the back part of the saloon building, which building was about two hundred feet distant from where the defendant was first seen. The entrance had been effected at the rear of the saloon. There was testimony to show that this alley was not used at night by pedestrians. The officer who saw the defendant did not then know that the crime had been committed, but thinking the circumstances somewhat suspicious he followed the defendant around for a short time and then arrested him, and found upon his person nine dollars in silver, among which was an amount and denomination of Canadian money, and a considerable amount of small change, similar to that contained in the money draw. The officer then went through the alley and saw that the building aforesaid had been broken into, and various evidences that the money draw had been robbed. At the trial the defendant undertook to account for his possession of the money, and testified that he obtained the Canadian money some time previously while in Victoria, and that the small change was the proceeds of sales made in a cigar store where he was employed the day preceding the night of his arrest. That one Frank McKegny was the proprietor thereof; that he had no regular employment

or salary there; that the proprietor would go away frequently and call him to take charge of the place; sometimes he was there a half day and sometimes a whole day; that he had been working there two weeks when he was arrested; that there was no agreement made with reference to his pay; that the proprietor had told him to take whatever he felt like taking; that he had known for several days that he was to be tried that day; that he had no one in court to corroborate him in the matters he had testified to, but that he could get some one to do so. Witness did not claim that he had made any attempt to procure such witness, and no request or effort was made then to get such testimony. That the testimony of the witness as to his employment and pay in accounting for his possession of the principal part of the money found upon him was true is improbable, and his not having made any attempt to procure McKegny or any one to corroborate him, he having testified that he could get such a witness, and that he had known for several days when he was to be tried, was a very strange course to pursue upon his part if his story was true. No reason or excuse therefor was shown or offered. Without giving his testimony in full, it is sufficient to say that no very satisfactory explanation or reason was given for his having been in this alley at such an unseasonable hour. There were a number of circumstances pointing to the guilt of the prisoner, and the testimony is sufficient to support the verdict here. Counsel relied much in his argument upon the difference in amount between the sum stolen and the sum found upon the person of the defendant, but this might be accounted for in various ways, and was no very strong point in his favor. Very likely the crime was committed by two persons, each taking a portion of the money.

The judgment is affirmed.

ANDERS, C. J., and DUNBAR, STILES, and HOYT, JJ.,  
concur.



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June, 1891.] Opinion of the Court — ANDERS, C. J.

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[No 263. Decided June 26, 1891.]

H. E. PARRISH v. THOMAS M. REED, *Auditor of the State of Washington.*

## MINING BUREAU — POWERS — MANDAMUS — PRACTICE.

The act creating a mining bureau and defining its powers (Laws 1889-90, p. 249) does not authorize the mining bureau either to direct or superintend a geological or mineralogical survey of the state, nor to disburse moneys appropriated for such purpose.

The act of March 7, 1891, appropriating moneys "for making a geological and mineralogical survey of the state," does not expressly nor impliedly enlarge or define the powers and duties of the mining bureau, and make it the agency whereby the same is to be expended.

In an application to the supreme court for *mandamus*, no alternative writ will be issued, unless the allegations in the petition therefor make out a *prima facie* case for the issuance of a peremptory writ. (Opinion on rehearing.)

*Original Application for Mandamus.*

*D. E. Baily, Wm. S. Church, and B. F. Dennison, for petitioner.*

The opinion of the court was delivered by

ANDERS, C. J. — This is an application by the plaintiff, upon motion and affidavit, for a writ of mandate commanding the respondent, who is state auditor, to draw his warrant upon the state treasurer in favor of the plaintiff for the payment of a voucher certified to by the president and secretary of the mining bureau for \$150, alleged to be due and owing to plaintiff for services as assistant state geologist for the month of May, 1891. It appears from the affidavit accompanying this motion that the mining bureau, at a regular meeting held at Olympia on April 9, 1891, at which a majority of its members was present, directed a geological survey of the state to be made, and that, in furtherance of that determination, at a subsequent regular

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Opinion of the Court—ANDERS, C. J.

[2 Wash.]

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meeting, held on April 20, 1891, the said mining bureau, by a majority of its members, employed the plaintiff, the said H. E. Parrish, to perform labor and services in the field in assisting to make such survey, at a compensation of \$150 per month, payable monthly; that, in pursuance of said employment, the plaintiff performed labor and services in the field in assisting to make such survey during the entire month of May, 1891; that at a regular meeting held at Olympia on June 13, 1891, the said mining bureau examined, audited and allowed the voucher, bill and claim of plaintiff for his said services during said month, which voucher, bill and claim amounted to the sum of \$150, no part of which has been paid; and that the same, after having been so examined, audited and allowed, and after having been indorsed and signed by the president and secretary of the said mining bureau as correct, was presented to the respondent at his office in the city of Olympia, and a warrant therefor upon the state treasurer demanded of said auditor, who refused to draw any warrant therefor, and rejected said voucher. It further appears from the said affidavit that the reasons assigned by the respondent for rejecting the voucher and refusing to draw a warrant upon the state treasurer, as requested by plaintiff, were "that, upon examination of the law creating a mining bureau, and defining its duties, approved February 25, 1890, I fail to find any provision whereby it is authorized to superintend a geological survey of the state, or is given the power to audit the claims incurred by parties engaged in the performance of such service;" and that "the provision in the general appropriation act of March 7, 1891, making an appropriation for a geological and mineralogical survey of the state, does not designate any officer or commission whose duty it shall be to expend the same; and I am therefore of the opinion that the appropriation herein referred to cannot be drawn until further legislation has been had upon the subject."

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June, 1891.] Opinion of the Court — ANDERS, C. J.

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From the foregoing it is apparent that the controversy in this case is simply the result of a difference of opinion between the plaintiff and respondent as to the powers and duties of the mining bureau, as defined and prescribed by law. It was the manifest duty of the auditor to draw the warrant demanded by plaintiff, if there is any law authorizing the issue of the same, and if the claim or voucher of the plaintiff is properly audited and allowed; but, if there is no such law, then such refusal was in every sense proper, and strictly in accordance with his official duty. See Laws 1889-90, p. 637, § 6. As has been seen, the respondent claims that no provision has been made by the legislature authorizing the mining bureau to direct or superintend a geological and mineralogical survey of the state, or to audit or allow any claim against the state, incurred by parties engaged in the performance of such service. The powers and duties of the mining bureau are defined in the act of the legislature entitled "An act to create a mining bureau, and to define its powers and duties, and declaring an emergency," approved February 25, 1890 (Laws 1889-90, p. 249), and are as follows:

"SEC. 3. It shall be the duty of the mining bureau to collect reliable statistical information concerning the production and reduction of all precious and useful minerals of this state, and examine the different processes for the treatment of ores used in this state; to inquire into the merits of other processes alleged or demonstrated by practical experience elsewhere to be the most successful; to inquire into the relative merits of the various inventions, machines and mechanical contrivances now in use, or which may hereafter be introduced for mining and metallurgical purposes; to keep on file in their office reports and papers which may be published from time to time, and all correspondence on the subject of mines and milling and reducing ores, with the view of eliciting and collecting such information for the public use. They shall address circulars to corporations and individuals engaged in mining, and

shall correspond with the school of mines in other states in reference to the mining and metallurgical interests. They shall make a report to the governor, for transmission to the legislature, of the operations of the bureau on or before the fifteenth day of January in each year for the year ending on the thirty-first day of December of the preceding year, which report shall contain all statements of accounts, money received and expended, statistics, and other information which may tend to promote the development of the mineral resources of the state, and such other reports from time to time as they may deem necessary. They shall examine, audit and allow all bills which relate to expense of money received by or appropriated for this purpose; they shall co-operate with the bureau of statistics, agriculture and immigration; they shall be allowed to employ such clerical assistance as may be necessary to carry out the full intent of this act."

Upon a critical examination of this act, it will be seen that there is no expression of the legislature therein indicating an intention to authorize the mining bureau either to direct or superintend a geological or mineralogical survey of the state, or to disburse the moneys appropriated for such purpose. It is simply authorized to collect certain reliable statistical information, specified in the act, and to examine, audit and allow all bills which relate to expenditure of money received by or appropriated for that purpose, the expenses under its provisions being limited to \$1,500. Nor do we think the powers or duties of the mining bureau have been in any way enlarged or changed by any provision contained in the general appropriation act of March 7, 1891. By that act the sum of \$50,000 was appropriated "for making a geological and mineralogical survey of the state, and making and publishing maps and reports of the same," but the act is silent as to the method or agency whereby the same is to be expended. Indeed, if the legislature had attempted to enlarge or define the powers and duties of the mining bureau in the general appropriation act, the provis-

June, 1891.]

Concurring Opinion — HOYT, J.

ion would have been nugatory, as being in contravention of that portion of the state constitution which declares that "no bill shall embrace more than one subject, and that shall be expressed in the title." Const., § 19, art. 2. It was no doubt the intention of the legislature when it made this liberal appropriation for the purpose of ascertaining and thereby assisting in the development of the mineral resources of our state, to further provide for the expenditure thereof, and it is probable that it intended to impose that duty and responsibility upon the mining bureau. But we find nowhere in the law any express, or even implied, indication of that intention. Owing to its importance and its probable effect upon the mining interests of this state, we have carefully considered this case, and we are unable to resist the conclusion that the appropriation above referred to cannot be disbursed, or warrants thereon legally drawn, without further legislation upon the subject. It follows, therefore, that the motion of the plaintiff must be denied.

SCOTT and DUNBAR, JJ., concur.

HOYT, J. (*concurring*). — I fully concur in what has been said by the chief justice in deciding this case, and I do not desire to add anything as to the merits of the controversy; but, in view of what was said by the attorneys for the petitioner at the time of the application for the writ, to the effect that they supposed the alternative writ would issue almost as a matter of course, I desire to say a word as to the course and practice of this court in matters of this kind. The writ of mandate is not a writ of right of as high an order as a writ of *habeas corpus*. The latter writ is, of course, of the very highest right, and is regarded of such importance that it is secured and protected by the constitutions of nearly all the states. Yet even the writ of *habeas corpus* does not issue as a matter of course. The facts alleged in the petition therefor must be such that, if

• true, they would, in the opinion of the court, warrant the discharge of the petitioner. The facts stated in the petition are taken as true, and the court determines therefrom whether or not they would warrant a discharge of the petitioner, and if, in its opinion, they would not do so, then the courts do not hesitate to refuse even this writ of highest right. See Church on Habeas Corpus, § 99. If this is true as to the writ of *habeas corpus*, it follows that the courts will scrutinize somewhat carefully the allegations of the petition for a writ of mandate, which is not a writ of such high right, and will only grant the alternative writ when, in its view of the law, the facts stated in the petition, if uncontradicted, will authorize the issue of the peremptory writ. Such has been the practice of the courts of nearly all the states of this union. The practice of this court has been to allow counsel for the petitioner, at the time he makes application for the alternative writ, to make such brief suggestions as he may think proper, and with such suggestions the court takes the papers, and if, in its opinion, a *prima facie* case is established, orders the issue of the alternative writ; and if, in its opinion, such petition does not set out facts constituting a *prima facie* case for the issue of the mandatory writ, it denies the application for the alternative writ, and dismisses the petition. In this case, however, the court realized the great importance of the questions involved, and, although upon an inspection of the papers it was satisfied that a *prima facie* case was not made out, departed from its usual custom, and notified counsel for the petitioner that they might present arguments in support of the petition, which was done; and able counsel, at such length as they saw fit, argued as to the sufficiency of the petition to warrant the issuing of the writ. After such argument, the court being still of the opinion that the petition did not state facts warranting the issue of the writ, could not do otherwise than refuse it.

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June, 1891.]On Petition for Rehearing.

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It cannot be held that the legislature intended, in providing for writs of mandate, that any person, simply by coming into court and filing a petition without any merit therein, could properly put a public officer to the expense of employing counsel and making a return to an alternative writ issued upon such insufficient petition. Besides, in this case the reasons why the auditor had refused to do the acts sought to be compelled by the petitioner fully appeared in the petition, and, in the opinion of this court, were warranted by the law of the case. This being so, there was but one duty for the court to perform, and that was to sustain the auditor in his refusal to do said acts.

STILES, J. (*dissenting*).—Section 26 of article 2 of the constitution provides that the legislature shall direct by law in what manner and in what courts suits may be brought against the state. Upon this subject no legislation has been had, and it is therefore assumed that there is no present way by which a claimant against the state may have his rights adjudicated. In the present case the petitioner claims to have performed services for the state, and seeks as his only remedy a *mandamus* against the auditor. Under such a state of facts I think that the courts should be somewhat liberal in the granting of alternative writs, and that in this case the alternative writ should be issued, as it is only after the issuance of the alternative writ that the petitioner has any real opportunity to have his cause presented by counsel and argued to the court. For this reason I do not agree to the decision of the court, and express no opinion on the merits of the application.

#### ON PETITION FOR REHEARING.

HOYT, J.—In the petition for a rehearing in this cause it is strongly insisted that the court should have granted the alternative writ, even although it was of the opinion

that the peremptory writ would be denied on final hearing. In the opinion rendered we attempted to show that to do this was not according to the practice of the courts, and that in this court, at least, such had never been the course adopted. We only desire to say a word in addition to what was then said. The respondent in such a proceeding is not necessarily called upon to answer such alternative writ by showing cause why the peremptory writ should not issue, instead thereof he may return that he has done the act which it is sought to compel. If he should take this course the alternative order of this court would probably be a complete justification for the act, however illegal. In the case at bar, if the court had granted the alternative writ, the auditor might have issued the warrant in question and returned his action in so doing as a complete answer to said writ. And it would have followed that the order of this court would be pleaded as justification for an act which was in its opinion, clearly illegal. The above statement clearly shows that the course contended for by the petitioner would be an improper and dangerous one.

A further contention is, that the petition on its face *prima facie* established the right to the relief prayed for. This is probably true if we were bound by the conclusions of law therein pleaded. If this court was bound to accept as true the twelfth paragraph of the petition, there would be little left to be decided. Said paragraph is as follows:

“*Twelfth.* That the said Thomas M. Reed was at all times mentioned herein and now is the duly elected and qualified auditor of the State of Washington; and that it was then and now is, his duty enjoined by law to draw his warrant upon the state treasurer for the payment of said voucher, bill and claims; but he unlawfully refused and still refuses so to do.”

What is herein alleged as a *fact* is the very question of law that the court was expected to decide. It needs no argument to prove that this and other conclusions of law



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June, 1891.]On Petition for Rehearing.

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could not be taken as true simply because alleged in the petition. The court was bound by the allegations of *fact* in the petition, and if, assuming them to be as stated, it was of the *prima facie* opinion that the peremptory writ should issue, then the alternative writ should have been granted; but if from such facts the court was of the opinion that the peremptory writ would be denied, then the alternative one was properly denied. In other words, it would have been idle to call upon the respondent to answer a petition which did not, in the opinion of the court, even *prima facie* state a cause of action. Besides, in this case it appears from the petition that the auditor had substantially admitted the main facts pleaded therein, and had stated his view of the law to be directly contrary to the theory of the petitioner. It would have followed that, if the alternative writ had issued, he might well have thought that the court must be of the same opinion as the petitioner, as to the law applicable to the facts, and, as he could not deny the facts, that he ought to accept the view of the court as to the law, and, as directed, issue the warrant at once, and stop further contention.

This was a cause of importance to the public, and the court for that reason heard the petitioner much more fully than usual. When the petition was presented full argument was allowed, and the matter taken under advisement, and upon a conclusion being reached that there was no merit in the petition, instead of at once entering an order of dismissal, the counsel for petitioner were called and an intimation as to the situation given, and further argument allowed. We have carefully examined the able argument on the merits contained in the petition for rehearing, but our opinion has not been changed thereby. For, while it is true that several ingenious theories have been presented upon which it could be held that the legislature *might* have intended to legislate as claimed, yet none of them satisfy

us that in fact such *was* the intention; and for this court to hold that money could properly be paid out of the funds of the state because the legislature might have so intended, or even because it did so properly intend, would establish a precedent that would threaten greater evils to the commonwealth than will the delay for a few months of the work of the mining bureau, however important it may be. It is the contemplation of our constitution that money should only be paid out of the treasury of the state under and by virtue of some positive provision of law, and before this court will coerce the administrative officers into making such payments, the authority for so doing must appear with reasonable certainty.

The petition is denied.

ANDERS, C. J., and DUNBAR and SCOTT, JJ., concur.

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[No. 130. Decided July 1, 1891.]

BELLINGHAM BAY RAILWAY AND NAVIGATION COMPANY *et al.* v. DAVID A. LOOSE.

EMINENT DOMAIN — ENTRY BEFORE CONDEMNATION — TRESPASS.

Where an entry is made by a railroad upon lands without notice to the owner thereof of an intention to take under the statute for that purpose, and without any setting apart of the land to be so taken, the owner may maintain trespass for injuries to his trees and other property, and is not confined to the proceeding provided by the act of February 1, 1888, regulating the mode of appropriating land, and ascertaining and securing compensation therefor.

*Appeal from Superior Court, Whatcom County.*

The facts are fully stated in the opinion.

*H. B. Williams, and Albert S. Cole, for appellants.*

*Doolittle, Pritchard & Stevens, and H. A. Fairchild, for appellee.*

July, 1891.]

Opinion of the Court — HOYT, J.

The opinion of the court was delivered by

HOYT, J.—Respondent brought an action of trespass against the appellants to recover damages for the destruction of certain trees and shrubbery situated upon land owned by him and in his possession. Appellants answered, admitting the trespass, but attempted to justify the same by alleging that the defendant, the Bellingham Bay Railway & Navigation Company, was a corporation duly organized to construct a railroad, and that it had appropriated said land, and entered upon the same, by virtue of the provisions of an act entitled “An act to regulate the mode of proceeding to appropriate lands,” etc., passed February 1, 1888, and that the acts of the other defendants were done under its direction. Respondent had a verdict and judgment in the court below, from which appellants prosecute this appeal. The sole contention upon their part is as to the rights of railroad corporations under the act above quoted. Their claim is, that both the railroad and the owner are given the right to proceed under said act to have fixed the compensation to be paid the owner for property taken, and that by the terms of § 14 of said act the same is made exclusive of all other remedies, and that for that reason the action of trespass will not lie.

It is somewhat difficult to understand just what the legislature meant by providing all the details for condemning property, and the method of fixing compensation therefor, and making it applicable to both owner and railroad company. The whole scope of the act is that of one designed only for the use of the corporation desiring to acquire land, and is largely inapplicable to the case of an owner desiring simply to obtain compensation therefor, and the only reasonable interpretation that can be given would seem to be that the owner could only make use of this means of obtaining compensation when the property had already

been taken possession of and fully occupied by the railroad, either with his actual consent, or under such circumstances that his consent would be presumed. It is not necessary, however, for the purposes of this case, to decide just what the respective rights of the appropriator and owner of lands are under said act. It is sufficient for my purpose to decide that where, as in this case, the entry is made without any notice to the owner of an intention to take under the act in question, and without any setting apart of the land to be so taken, said act will not so apply as to defeat an action of trespass by the owner, and I think such must be the construction of said act. I am satisfied that it could not have been intended thereby to clothe a railroad or other corporation with the right to go upon the premises of any person, and destroy his trees and other property, without in any manner giving him notice that in doing such acts they were proceeding under the law for the appropriation of property for public use. Such would not be a reasonable provision of law. Under it an owner of property would be powerless against the arbitrary and oppressive methods of a corporation. Before there would be given any opportunity on the part of such owner to contest the question as to whether or not such lands were necessary for the purposes of the corporation, all the acts of damage would have been accomplished. And if, afterwards, the owner should seek compensation under the act in question, how could he protect himself and intelligently maintain his contention that such taking was not necessary? Besides, the provision of our constitution, providing that no property shall be taken for public use without compensation being first paid therefor, might be entirely nullified. The corporation, after procuring the condemnation of the property and its possession thereunder, might long delay the payment of the award therefor; and while it is true that the constitution was not in force at the time of the

July, 1891.]

Opinion of the Court—HOYT, J.

trespass alleged, yet I think that substantially the same rule obtained under the organic act. If I were to construe the statute as contended for by appellants, I should think it clearly unconstitutional, as tending to render inoperative that provision of our constitution (and of the organic act) referred to above. It is true that it might not in terms and directly provide for taking one's property without compensation first paid, but its effect might be to practically accomplish that end. I think the more reasonable interpretation of the statute is to hold that a corporation desiring to appropriate land from another must, before entering thereon (except for the purpose of survey as provided by statute), proceed under said act to show the necessity for such taking, and have the compensation to be paid fixed and actually paid or secured before it would have a right to take possession of and work upon the same. Under it the owner, after a corporation had actually taken possession of his property so that the degree of its occupancy was fully shown, could probably proceed to have his compensation assessed, if he saw fit to do so, instead of bringing an action of trespass for his damages; and, if he had given express or tacit consent to such occupancy by the corporation, he would probably be bound to proceed under said act, and could not bring his action of trespass. Thus construed, the statute is reasonable, and not oppressive; but, construed as contended for by appellants, it is most unreasonable and oppressive, and, in my opinion, unconstitutional. It follows that the action of the court below was correct, and must be affirmed.

Some preliminary questions were made in regard to the state of the record in this case, but as the act under which it is contended certain portions of the record are here has been repealed, so that the questions presented are not likely to arise in the future, and, as we have seen above, the result upon the merits is in favor of the ruling of the court below,

the same as it would have been had such portions of the record been stricken, it is not necessary, and would perhaps be unwise, for us to decide the questions raised by the motion to strike. Were the whole record before us, together with the testimony introduced upon the trial, it might be necessary for us to decide the question as to whether or not a corporation authorized to appropriate lands, when sued as in this case, in an action for willful trespass, could plead the act which I have been discussing, and thereby prevent a judgment against it for triple damages. But without the testimony we are not called upon to decide that question, and therefore decline to do so.

ANDERS, C. J., and SCOTT and DUNBAR, JJ., concur.

STILES, J., disqualified.

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[No. 175. Decided July 1, 1891.]

THOMAS WATSON V. THE STATE OF WASHINGTON.

CRIMINAL LAW—ASSAULT WITH INTENT TO MURDER—INFORMATION—ALLEGATIONS.

An information which alleges in the formal part that the defendant is "guilty of the crime of assault with intent to commit murder," but which fails, in setting out the acts constituting an assault, to affirmatively charge that by such acts defendant intended to murder the party assaulted, merely charges the crime of assault.

Where, upon such information, defendant has been sentenced for a term beyond the power of the court to impose for the crime charged, he will not be discharged on a reversal of the judgment, but the case will be remanded with instructions to the court below to sentence the defendant as upon conviction for simple assault.

*Appeal from Superior Court, Lewis County.*

The facts are fully stated in the opinion.

*McGinn & Simon, for appellant.*

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July, 1891.]Opinion of the Court — HOYT, J.

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The opinion of the court was delivered by

HOYT, J.—Appellant was placed upon trial in the superior court of Lewis county, on an information substantially as follows:

“Comes now W. A. Reynolds, prosecuting attorney for said Lewis county, State of Washington, the said superior court of the said Lewis county being in session, and the grand jury for said county not being in session, and now here said prosecuting attorney gives said superior court to understand and to be informed by this information that the above named Thomas Watson is guilty of the crime of assault with intent to commit murder, committed as follows: The said Thomas Watson, in said Lewis county, State of Washington, to wit, the 19th day of April, A. D. 1890, feloniously, purposely, and of his deliberate and premeditated malice, and in a rude, insolent and angry manner, did then and there assault, and unlawfully attempt to touch, strike, beat, wound and shoot C. A. Morgan, then and there having the present ability so to do, by then and there feloniously, purposely, and of his deliberate and premeditated malice, and in a rude, insolent and angry manner, shooting at said C. A. Morgan with a revolver, which he, the said Thomas Watson, then and there held in his hands.”

A verdict of guilty was rendered in the action, and the court proceeded to pass sentence thereon. At that time, and before sentence had been imposed, counsel for appellant suggested to the court that the information only charged the crime of assault, and asked that sentence be imposed for that crime only. The court, however, was of the opinion that the information sufficiently charged the crime of assault with intent to commit murder, and sentenced the appellant to imprisonment in the penitentiary at hard labor for three years. To such judgment and sentence appellant duly excepted, and the case is now here for review; the only question involved in the appeal being as to whether or not such information charges the crime of assault with intent to commit murder. It will be seen that

the question as to the sufficiency of this information was raised by the appellant at the first opportunity. He could not demur thereto, because it sufficiently charged the crime of assault, and therefore the question is not here presented as to what would be the effect of laches on the part of the defendant in seasonably raising objection to an information defective like the one in this action. The simple and only question is as to the sufficiency of the information to resist a seasonable attack.

The crime of assault with intent to commit murder is made up of two distinct, substantive elements: *First*, there must be an assault; and, *secondly*, there must be the intent to commit murder. The intent is said to be the gist of the offense, and all the authorities concur in holding that, without a sufficient allegation and proof of such intent, there can be no conviction for the aggravated assault. 1 Whart. Crim. Law, § 641; 2 Bish. Crim. Proc., §§ 77, 651; *State v. Neal*, 37 Me. 468. There is nothing better settled in the law than that in criminal pleading all the facts necessary to constitute the offense must be charged in the information; and, applying that rule to the crime attempted to have been charged in this cause, it will be seen that, to constitute a good information, there must have been an affirmative allegation of acts constituting an assault, and a like allegation that by such acts the person charged intended to murder the injured party. An examination of the information above set out will show that the only place therein, where intent is at all mentioned, is in the formal part where the name of the alleged offense is given. Can such a simple naming of the offense be said to charge that the acts constituting the assault were committed with the necessary intent? I think not. It might as well be said that the acts constituting the assault were sufficiently charged in the same clause as included in the name of the crime, for, as we have seen, an affirmative allegation of the



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July, 1891.]Opinion of the Court—Hoyt, J.

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intent is equally as necessary as that of the assault. Of course no one would contend that the crime of assault would be sufficiently charged by simply naming it as the offense which had been committed, without in any way setting out the facts constituting the same, and I think it equally clear that the simple naming of the intent as a part of the name of the crime is likewise insufficient. When the prosecutor says that he charges the defendant with the crime of an assault with intent to commit murder, the most liberal system of pleading will not allow such allegation to be treated as an affirmative allegation that an assault has been committed, and that the defendant in doing the acts constituting the assault did them with the intent to commit murder. The only crime charged in the information is that of assault, and the court should have imposed sentence therefor only.

The sentence to imprisonment for the term of three years was beyond the power of the court to impose for such crime, and therefore was unwarranted. Such being the condition of the cause, counsel for appellant contends that this court should not only reverse the judgment and sentence, but should remand the cause, with instructions to discharge the defendant. I do not think that such should be the result of the appeal. When a criminal cause brought here by the defendant on appeal is reversed, the usual result is only to have the cause remanded, with instructions, express or implied, to correct the error, and then proceed; and the fact that the defendant has, pending the appeal, been confined has no legal bearing upon the after proceedings. As a matter of fact, however, the courts usually take into consideration all the circumstances of the case in imposing punishment, and, as one of such circumstances, the time defendant has been in jail. When an appeal is taken the finality of the judgment is suspended, and if such appeal

results in a reversal, the cause stands as though no judgment had been rendered. For these reasons I think that the cause should be reversed and remanded, with instructions to the court below to sentence the defendant as upon conviction for simple assault.

ANDERS, C. J., and SCOTT, DUNBAR, and STILES, JJ., concur.

[No. 191. Decided July 1, 1891.]

OLE HANSON AND FRED LARSON V. GEORGE E. TOMPKINS.

VENDOR AND VENDEE — MISREPRESENTATIONS — MUTUAL MISTAKE — ACTION ON DEBT NOT DUE — STATEMENT OF FACTS.

In an action upon a promissory note given in part payment for a tract of land represented by the plaintiff as containing  $36\frac{1}{2}$  acres when in fact it only contained  $26\frac{1}{2}$  acres, plaintiff can only recover for the balance of purchase price on  $26\frac{1}{2}$  acres, whether he knew the representation to be false, or whether there was a mutual mistake by both parties to the contract.

In an action upon a note not yet due, where the allegations of the complaint, that defendants have disposed of their property with intent to delay and defraud creditors, and that they are about to depart from the state without making any provision for payment of the note, are denied by the answer, and no proof is offered at the trial in support of such allegations, judgment for plaintiff is unauthorized.

A statement of facts not certified by the trial judge will not be considered by the supreme court.

*Appeal from Superior Court, Snohomish County.*

The facts are sufficiently stated in the opinion.

*W. P. Bell, L. F. Hart, and Andrews & Barnes, for appellant.*

2 508  
3 583  
3 691

2 508  
e38 428

2 508  
e42 516

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July, 1891.] Opinion of the Court—DUNBAR, J.

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The opinion of the court was delivered by

DUNBAR, J. — This was an action brought upon a promissory note for \$350 not yet due, and for \$50 attorney's fee, with an allegation that defendants were about to remove from the State of Washington and the United States, refusing to make arrangement for securing the payment of said debt, with prayer for judgment, and for the issuance of a writ of attachment. Affidavit for attachment was filed. The answer admits the execution of the note, and alleges want of consideration; alleges the fact to be that plaintiff sold defendants a certain tract of land for \$1,350, \$1,000 of which was paid down, and the note for \$350 was given for the balance of the purchase price of said land; that the number of acres bought was understood to be forty, at an agreed price of \$33.75 per acre. This land was composed of lot No. 2, and a small portion of the N. W.  $\frac{1}{4}$  of section 22, township 29 N., of range 5 E. of Willamette meridian. That plaintiff, intending to cheat the defendant and co-defendant, falsely and fraudulently represented to them that said lot 2 contained  $36\frac{1}{2}$  acres, when in truth and in fact it contained but  $26\frac{1}{2}$  acres; and that, wholly and solely relying on the said fraudulent and false representations of plaintiff, defendant and co-defendant, believing there were forty acres in said tract of land, signed the said note for \$350. That the plaintiff agreed with and promised defendant, on the 12th day of December, 1889, to deed to them a sufficient amount of land off of the east side of the northwest quarter of said section 22 to make, when added to lot 2, forty acres. That in the following February, 1890, the defendants first learned that lot 2 contained but  $26\frac{1}{2}$  acres of land, whereupon they went to plaintiff, and offered and demanded of him to deed them ten acres more land off the east side of the northwest quarter of the northwest quarter of said section 22,

or to rescind said contract; and demanded of him their money, viz., \$1,000, and their note, for which they offered to deed said land back to plaintiff; and plaintiff refused to return to defendants their note and money, or any part thereof. All of these allegations in the answer were denied in the reply, and on these issues the cause was tried. Other matters were alleged in the answer, but their consideration is not necessary to the determination of this cause. Two statements of fact came up with the record, but this court can only consider the statement certified to by the trial judge. Both plaintiff and defendant testified that it was the intention to convey forty acres of land; the real contention being whether or not forty acres of land had really been conveyed. There seems little, if any, doubt from the testimony that lot 2, instead of containing  $36\frac{1}{2}$  acres, actually contained only  $26\frac{1}{2}$  acres.

Several instructions were presented and requested by defendants, which, we think, correctly stated the law; but, as the reverse of such instructions was given by the court, we will notice it. Among other instructions, the court gave the following:

“If you should find that as a matter of fact said plaintiff did represent said tract to contain 36.50 acres when as a matter of fact it only contained 26.50 acres, you must still find a verdict for the plaintiff, unless you further find by a preponderance of the evidence that the plaintiff knew at the time he made such representations that the same were false, and made them with the intent thereby to deceive the defendants, if the mistake (if you find there was a mistake) was a mutual one, and innocently made by the plaintiff, he cannot be charged therefor in this action.”

This instruction was plainly erroneous. If the defendants relied upon the representations of the plaintiff, and were led to believe by such representations that lot 2 contained  $36\frac{1}{2}$  acres, when in fact it only contained  $26\frac{1}{2}$  acres, and were induced by such representations to purchase said

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Opinion of the Court—DUNBAR, J.

lot as a lot of  $36\frac{1}{2}$  acres, it makes no difference whether plaintiff knew such representations to be false or not, he is liable. If he knew the lot did not contain  $36\frac{1}{2}$  acres, and represented to defendants that it did, he would be guilty of fraud and deceit; but if he did not know it, and believed that the representations he made were true, and defendants, acting upon such representations, were damaged because it eventuated that they were not true, the liability of the plaintiff would be the same. In neither case will he be allowed to retain the benefit flowing from his misrepresentation. Mr. Justice Story thus states the rule: "Whether a party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false." 1 Story, Eq. Jur., § 193, and note. See, also, *Page v. Bent*, 2 Metc. (Mass.) 371; *Stone v. Denny*, 4 Metc. (Mass.) 151; *Milliken v. Thorndike*, 103 Mass. 382; *Bennett v. Judson*, 21 N. Y. 238; *Litchfield v. Hutchinson*, 117 Mass. 195. In fact this view of the law is so well established that we think it not necessary to comment further upon it.

There is another phase of this case which is fatal to the judgment. This action was brought upon an alleged debt not yet due. The complaint alleged that the defendants were about to depart from the state without making any provision for the payment of the note, and also that the defendants had disposed of their property with intent to delay and defraud their creditors. These allegations were denied by the answer and no proof was offered at the trial in support of them. These are material allegations to the complaint, and the facts therein set forth must be proven, like any other fact, to authorize judgment. See *Cox v. Dawson*, ante, p. 381 (decided by this court at this term).

Judgment is reversed, and the cause remanded to the lower court, with instructions to proceed in accordance with this opinion.

ANDERS, C. J., and SCOTT, STILES, and HOYT, JJ., concur.

[No. 206. Decided July 1, 1891.]

WILLIS A. RITCHIE v. JOHN CARPENTER.

FOREIGN JUDGMENTS — ATTESTATION — EVIDENCE — VARIANCE —  
JURISDICTION — PLEADING.

Under Code 1881, § 430, the records and proceedings of courts of another state are admissible in evidence in all cases in this state without the certificate of the judge thereof that the attestation of the clerk having charge of the records of such court is in due form.

Under § 905, Rev. St. U. S., it will be presumed, without being certified or otherwise shown, that the clerk attesting such records offered in evidence is the proper custodian thereof.

In attesting such records it is not necessary that the seal of the court be attached to the records, but only to the certificate of the clerk.

The signature of the judge to the journal entry of the judgment offered in evidence is not necessary to make it valid.

Where a complaint describes a judgment as rendered for costs in the sum of \$19.30, and the judgment offered in evidence was rendered for \$18.30, the variance is immaterial.

In an action upon a judgment of the district court of the State of Kansas, originally instituted before a justice of the peace, the objections raised here, that the action was instituted and carried on in Kansas, without any complaint having been filed, that there was no proof that the justice had any authority to certify the case to the district court, and that he did not in fact so certify it, are wholly immaterial.

In an action upon a judgment of a court of record of another state, it will be presumed, in the absence of evidence to the contrary, that it is a court of general jurisdiction; and the recitals in the record of such court of the jurisdiction acquired over defendant's person in that proceeding are *prima facie* evidence thereof.

2	512
9	69
9	184
28*	380
36*	1046
37*	678
2	512
18	528
2	512
35	479

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Want of jurisdiction may be shown by the defendant even to the extent of contradicting express recitals in the record; but pleas to the jurisdiction must be direct and certain, and set up the facts which go to show a want of it.

The name of the defendant in the record offered being identical with that of the defendant in this action is *prima facie* proof of identity of person; and it is incumbent upon the defendant, in order to raise the question of identity, to allege and prove every fact necessary to show that the court had no jurisdiction of his person.

In an action upon a judgment of a court of the State of Kansas, a verdict for the aggregate amount of the judgment there rendered, including the costs of the proceeding and interest thereon, is not erroneous.

*Appeal from Superior Court, King County.*

The facts are fully stated in the opinion.

*G. E. M. Pratt, and Thompson, Edsen & Humphries,*  
for appellant.

*Allen & Powell,* for appellee.

The opinion of the court was delivered by

SCOTT, J.—This action was brought by respondent to recover on a judgment which he claimed to have obtained against the appellant in the district court of Cowley county, Kansas. It will require a somewhat extended statement to present the points raised. The amended complaint alleges:

“*First:* That during all the times herein stated the district court of the thirteenth judicial district of the State of Kansas, in and for the county of Cowley, was a court of general jurisdiction, duly created and organized by the laws of said state.

“*Second:* That on the 22d day of May, 1889, this plaintiff commenced an action against the said defendant in the justice court for the city of Winfield, Cowley county, Kansas, before J. Van De Water, justice of the peace, to recover the sum of \$268.78 with interest, which was due this plaintiff by the defendant upon a certain promissory note, together with costs of suit; that on the 22d day of

May, 1889, a summons was duly and regularly issued out of said court, and was on the same day, to wit, May 22, 1889, served on the defendant, Willis A. Ritchie, personally, by the proper officer of said court; that on the 25th day of May, 1889, said cause came on regularly to be heard; that on said day said defendant appeared in person in defense of said action, at which time said cause, upon motion of said defendant, was continued until the 4th day of June, 1889, and on the 4th day of June, 1889, said cause was regularly called for trial by said court, and the defendant appeared in person and by attorneys, Messrs. Crow & White, and thereupon certain proceedings were had, it appearing to the said justice that, under the laws of the State of Kansas, the action should be stayed and should be certified to the district court of the thirteenth judicial district of the State of Kansas, in and for Cowley county, the said action was stayed, and was by said justice certified in due form to the said district court aforesaid.

“*Third:* That thereafter, to wit, on the 25th day of January, 1890, said cause came on regularly to be heard in said district court, the said defendant appearing therein by his said attorneys, Messrs. Crow & White, a judgment was duly and regularly rendered by said court, in said cause, in favor of the plaintiff and against the defendant, for the sum of \$301.40, and also for costs therein, amounting to and taxed at \$19.30; that said judgment bear interest from said date until paid at the rate of ten per cent. per annum; a copy whereof is hereto attached as a part hereof, and marked exhibit ‘A.’”

And contained a prayer for judgment in the sum of \$331.50 with interest thereon from the 27th day of May, 1890, at the rate of ten per cent. per annum, and for costs of suit. The defendant denied these matters generally, and for a further defense alleged as follows:

“*First:* He denies that the district court of the thirteenth judicial district of the State of Kansas, in and for the county of Cowley, ever obtained any jurisdiction over the subject-matter of any controversy between plaintiff and defendant, or ever had any such jurisdiction at any time over the subject-matter of any such action or proceeding as that de-



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scribed in plaintiff's amended complaint or of any other description whatever.

"*Second:* He denies that any cause of action in favor of plaintiff and against defendant ever existed or was pending in said district court of Cowley county, Kansas, or that any agreement or stipulation was ever entered into, by and between this defendant or any one authorized to act for him, or claiming or pretending to act for him, whereby any subject-matter of controversy of the character mentioned in plaintiff's amended complaint, or of any character, was agreed to be submitted without the intervention of a complaint, to said district court of Cowley county, Kansas, for determination.

"*Third:* He denies that any cause of action, or the subject-matter of any controversy, between plaintiff and defendant, was ever submitted to said district court of Cowley county, Kansas, for judgment and determination, with the knowledge or agreement of said defendant, or any one acting for him, whereby the filing of any complaint or cause of action was in any manner waived or dispensed with."

The only proof offered in evidence was the judgment record, to the introduction of which the defendant objected on the following grounds: That there is no showing that the district court of Cowley county, Kansas, had any jurisdiction of either the subject-matter of the action, or of the parties in controversy; that no statute of the State of Kansas is either pleaded or offered to prove the authority of the justice of the peace to certify an action or proceeding to the district court of Cowley county, or any other county in Kansas; that the justice of the peace did not in fact so certify such record; that the clerk of the district court aforesaid had no authority to certify to this court a copy of any such supposed transcript; that the said record had no seal of such district court attached to it, and that it was not sufficient to attach it to the certificate of the clerk; that the transcript showed that the judgment and record had not been signed by the judge of said court; that the judge did not certify that the attestation was in due form; that

there was a variance between the record as pleaded and the record offered in evidence. The court admitted the record, and it appears thereby that personal service was had on Willis A. Ritchie in Kansas when the action was commenced in justice's court, and that said defendant appeared in person and by his attorneys, Crow & White. That after answering he moved the court as follows:

“And now comes the defendant, and representing to the court that upon the issues raised by the pleadings herein, title to land is in dispute in this action, moves the court to certify this cause to the clerk of the district court of Cowley county, Kansas, in accordance with the provisions of § 7 of the act of civil procedure before a justice of the State of Kansas.”

Which motion the justice of the peace overruled at the time, but subsequently, after hearing evidence, granted. Then follows a transcript of the purported journal entry of the judgment rendered therein in said district court, which recites that:

“Now, on this 25th day of January, A. D. 1890, this cause comes on its regular order for trial; plaintiff appears by Peckham & Henderson, his attorneys, and the defendant appears by Crow & White, his attorneys, and the plaintiff and the said defendant announce themselves ready for trial and waive a jury, declaring that this cause shall be heard and tried by the court, and hereupon both parties offer their evidence; in consideration whereof the court finds for the plaintiff and against the said defendant upon the issues joined between them herein, and finds that the said Willis A. Ritchie is indebted to plaintiff upon the promissory note sued on in the sum of three hundred and one and 40-100 dollars (\$301.40); and it is hereupon ordered and adjudged by the court that the said plaintiff do have and recover of and from the said defendant, Willis A. Ritchie, the said sum of three hundred and one and 40-100 dollars, and also his costs herein expended, amounting to \$18.30, and that the said judgment bear interest at the rate of ten per cent. per annum from the 25th day of January,

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1890; and that said plaintiff have general execution against the said defendant therefor.”

And the following certificates are appended, attested by the seal of said district court:

“STATE OF KANSAS, COWLEY COUNTY, ss.

“I, Ed. Pate, clerk of the district court of the thirteenth judicial district, in and for the county of Cowley and State of Kansas, do hereby certify that the foregoing are true copies of all the papers and pleadings, and the final journal entry in case No. 4077, John Carpenter *vs.* Willis A. Ritchie, which case was certified to this court by J. Van De Water, a duly elected and qualified justice of the peace for the city of Winfield, Cowley county, State of Kansas; and that said case was tried in this court and judgment rendered for the plaintiff and against the defendant, Willis A. Ritchie, for the full sum as claimed in his bill of particulars, and for costs as shown by the journal entry; and that the same is the only case between the same parties that has been in this court, and that no appeal was ever taken by the defendant, Willis A. Ritchie, to the judgment of this court, but that said judgment still remains in force and unsatisfied. Oct. 13th, 1890.” (Signed) “ED. PATE, clerk of the district court of the thirteenth judicial district, in and for Cowley county, State of Kansas.”

“I, M. G. Troup, judge of the thirteenth judicial district in and for Cowley county, State of Kansas, do hereby certify that the above certificate is signed by Ed. Pate, who is clerk of the district court of Cowley county, State of Kansas, and in the thirteenth judicial district.” (Signed) “M. G. TROUP, judge of the thirteenth judicial district of Kansas.”

“I, Ed. Pate, clerk of the district court of Cowley county, State of Kansas, do hereby certify that the last certificate is signed by M. G. Troup, who is judge of the thirteenth judicial district of the State of Kansas, October 15, 1890.” (Signed) “ED. PATE, clerk of the district court, Cowley county, Kansas.”

Section 1, article 4 of the constitution of the United States declares that “full faith and credit shall be given

in each state to the public acts, records and judicial proceedings of every other state; and the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Section 905 of the Revised Statutes is as follows:

"The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

Some of the minor errors alleged will first be taken up without following the order in which the objections have been stated. The point that the record was inadmissible in evidence because the judge did not certify that the attestation was in due form as required by § 905 of the Revised Statutes is disposed of by § 430 of the Code of Washington (1881), which reads as follows:

"SEC. 430. The records and proceedings of any court of the United States or any state or territory shall be admissible in evidence in all cases in this territory when duly authenticated by the attestation of the clerk, prothonotary or other officer having charge of the records of such court, with the seal of such court annexed."

While the legislature could not enact that any further or additional matters should be certified to not required by the laws of the United States, it could dispense with some of

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the requirements there provided for. See *Kingman v. Cowles*, 103 Mass. 283.

A further objection was also made, that it must appear by the clerk's certificate, or otherwise, that such clerk had charge of the records of the court in order to authorize him to certify thereto, as provided by the section of the code aforesaid; but § 905 of the Revised Statutes does not require this to be certified to or shown, and this fact would be presumed. The case last cited also holds that the seal of the court attached to the clerk's certificate attests his possession of the record.

The objections that the seal was not attached to the record, and that it was not sufficient to attach it to the certificate of the clerk, that the judgment entry was not signed by the judge, and that there was a variance between the record as pleaded and the one offered in evidence, are not valid. It is only necessary that the seal be attached to the certificate of the clerk, and there it is required by the section aforesaid of the Revised Statutes. See *Turner v. Waddington*, 3 Wash. C. C. 126. The signature of the judge to the journal entry of the judgment was not necessary to make it valid. See *Ainsworth v. Territory*, 3 Wash. T. 270; *Cathcart v. Peck*, 11 Minn. 45; *Childs v. McChesney*, 20 Iowa, 431 (89 Am. Dec. 545). The variance complained of is that the complaint described the judgment as having been rendered for \$19.30 costs while the judgment offered in evidence, though similar in other respects to the one pleaded, was rendered for costs in the sum of \$18.30. The judgment is pleaded in the third paragraph of the complaint; the denial thereto in the answer was as follows: The defendant "denies the allegations contained in the third paragraph of plaintiff's amended complaint." This was only a denial of the specific sum claimed, and was an admission of any lesser amount so far as the sum alleged was concerned. It is not claimed that the judgment below was,

and it does not appear to have been rendered for the full amount alleged and prayed for. The defendant was not misled. It was not shown or claimed that he was, and the variance was immaterial. Sec. 105 of the Code of Washington (1881) reads as follows:

“SEC. 105. No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and, thereupon, the court may order the pleading to be amended upon such terms as shall be just.”

The objections raised that there was no proof that the justice of the peace had any authority to certify the case to the district court, that he did not in fact so certify it, and one of the reasons urged in support of the objection raised to the jurisdiction, which was that the action was instituted and carried on in Kansas without any complaint having been filed, have no force here. The case was sent to the district court upon the defendant's motion and he appeared in the district court and contested the action. The cause of action apparently was founded upon a promissory note which was described in the notice issued by the justice to the defendant; the execution of the note was admitted in the defendant's answer, and a failure of consideration alleged as a defense. Under the circumstances these matters could only have been taken advantage of in the courts of Kansas, if at all.

Questions were raised as to where the burden of proof rested to show the jurisdiction of the Kansas court both over the subject-matter of the action and the person of the judgment debtor, and as to the identity of the defendant in this action as the judgment debtor, and also as to the construction and effect of the pleadings in relation to

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these matters. The appellant contends that it was incumbent upon the plaintiff to prove at the trial that the district court was a court of general jurisdiction, or that it had jurisdiction over the subject-matter of that action in any event, and especially so in this case because the plaintiff had alleged jurisdiction in his complaint which appellant denied in his answer. Such allegations in the complaint are not necessary it seems under the authorities. However, the allegation that the district court was one of general jurisdiction cuts no figure as to changing the burden of proof in this case. In the absence of evidence to the contrary it would be presumed that the district court aforesaid is a court of general jurisdiction. See *Phelps v. Duffy*, 11 Nev. 80; *Stewart v. Stewart*, 27 W. Va. 167; *Specklemeyer v. Dailey*, 23 Neb. 101; *Pringle v. Woolworth*, 90 N. Y. 502; *Butcher v. Bank*, 2 Kan. 70 (83 Am. Dec. 446). And the production of the record with the seal of the court to the certificate was *prima facie* evidence that it was a court of general jurisdiction. It being a court of record, it is presumed to have had jurisdiction of the subject-matter of the action. The record itself affords presumptive proof of these matters. The subject-matter of the action was the money claimed to be due for which the action was brought, not the documents certified to the district court by the justice. Questions as to how the issue got in the district court only go to the regularity of the proceedings, and as said before could only be taken advantage of there if that court had jurisdiction of this defendant's person therein. The recitals in the record of the jurisdiction acquired over the defendant's person in that proceeding are *prima facie* evidence thereof, and the defendant offered no proof to contradict any of these matters.

He also contends here that as his affirmative defense was not replied to or denied by the plaintiff that it must be taken as true, and that judgment should have been ren-

dered in his favor thereon. It is doubtful whether the defendant's whole answer raised any other issue than that of *nul tiel record*, and this is the only defense available under a general denial in an action upon a judgment of a court of record of a sister state. The so-called affirmative defenses were denials in form, and nothing was pleaded therein alleging that the court had not jurisdiction of either the subject-matter of the action, or of the defendant's person. The first paragraph of his further defense is the only one in any wise tending to show a want of jurisdiction of the subject-matter wherein it seems to deny that the court had jurisdiction of anything. The first part of the second paragraph attempts to deny that the cause of action ever existed. These amounted to nothing more than statements of conclusions of law. The remaining part of this defense related to wholly immaterial matters. The affirmative defense could not have stood had it been attacked in the superior court. Pleas to the jurisdiction must be direct and certain, and set up the facts which go to show a want of it. See *Hill v. Mendenhall*, 21 Wall. 453; *Welch v. Sykes*, 3 Gilman, 197 (44 Am. Dec. 689); *Diblee v. Davison*, 25 Ill. 486; *Moulin v. Insurance Co.*, 4 Zab. 222; *Shumway v. Stillman*, 4 Cow. 292 (15 Am. Dec. 374); *Price v. Ward*, 25 N. J. Law, 225. But no attention seems to have been given to the affirmative defense at the trial by either party. The appellant did not object to the plaintiff's proof as inadmissible on the ground that this defense had not been replied to, nor did he at any time move the court for judgment upon the pleadings or ask for an instruction for a verdict in his favor upon that ground. If his answer, under the circumstances, raised any issue except that of a bare denial of the record and any advantage could have been taken thereof, it was waived by him in failing to call the attention of the trial court thereto. It is possible an instruction was asked upon this ground by appellant, as an allusion is made in the record to instruc-



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tions drafted by the defendant which the court refused to give, but none of these requests to charge are in the record, and consequently we know nothing of them.

Some of the cases above cited go to the extent of holding that not even jurisdictional matters can be questioned in an action upon a judgment of a court of record of a sister state unless a want of jurisdiction is shown by the record. *Mills v. Duryee*, 7 Cranch, 480, seems to be the first case laying down the doctrine that a want of jurisdiction in such cases could not be shown. This was subsequently recognized to be the correct rule in the opinions rendered in a number of cases arising in the state courts. But it was held not to apply, and the effect thereof was avoided in nearly all of such cases to which our attention was called in holding that where the appearance was by an attorney his want of authority to appear could be shown; that the purported appearance by an attorney was only *prima facie* evidence thereof; or that where the record was silent as to any jurisdiction of the person it could be shown that the court in fact had no such jurisdiction, etc. It is now well settled by the weight of authority, and is undoubtedly the better rule, that want of jurisdiction may be shown by the defendant even to the extent of contradicting express recitals in the record, the same as in cases of foreign judgments. They are not regarded in the sense of foreign judgments so that the merits may be inquired into even where jurisdiction is had as in the case of judgments of the courts of other countries, nor yet in respect to jurisdictional matters are they to be regarded in the same light as judgments rendered in our own courts of record. The case of *Mills v. Duryee*, and cases following that decision, are modified to this extent. Freeman on Judgments (3d ed.), §§ 452, 453, and 559 to 566 inclusive; *Thompson v. Whitman*, 18 Wall. 457; *Shumway v. Stillman*, 4 Cow. 292 (15 Am. Dec. 374);

*Bissell v. Wheelock*, 11 Cush. 277; *Jarvis v. Robinson*, 21 Wis. 530; *Buffum v. Stimpson*, 5 Allen, 591 (81 Am. Dec. 768); *Wheeler v. Raymond*, 8 Cow. 311; *Reid v. Boyd*, 13 Tex. 241 (65 Am. Dec. 61); *Moulin v. Insurance Co.*, 4 Zab. 222; *Stewart v. Stewart*, 27 W. Va. 167; *Danforth v. Thompson*, 34 Iowa, 245; *Borden v. Fitch*, 15 Johns. 140 (8 Am. Dec. 225); *Price v. Ward*, 25 N. J. Law, 225. Nor did the fact that it was stated in the complaint in pleading the judgment record that the pleadings in Kansas were had against the defendant in this action, with the denials contained in the answer, raise any issue of identity of person, as such denials amounted to no more than a denial of the record, according to the authorities cited, and it was necessary in this particular to raise the question of identity, for the defendant to allege and prove every fact necessary to show that the court had no jurisdiction of his person. Had the court been one of limited jurisdiction, a different rule would obtain, and the party relying upon the judgment would be bound to show that the court had jurisdiction, if it was denied. But by the great weight of authority in cases like the one here, anything going to show a want of jurisdiction is an affirmative defense, as much so as a defense founded upon a set-off, or upon a payment of a judgment, or that it was obtained by fraud, or that the statute of limitations had run against it, unless this fact should appear upon the face of the complaint, in which case it could be taken advantage of by a demurrer. *Wilt v. Buchtel*, 2 Wash. T. 417. The name of the defendant in the record offered being identical with that of the defendant in this action is *prima facie* proof of identity of person. *Campbell v. Wallace*, 46 Mich. 320. The judgment record, when introduced in evidence, was *prima facie* proof of the plaintiff's right to recover in this action; no less effect could be given thereto under the authorities.

The main controversy in this case was as to what issues

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were raised by the pleadings, and as to where the burden of proof rested thereunder. The disposition made of the first point carries the second with it.

The last objection urged, raised in the motion for a new trial, that the damages recovered were excessive, in that interest was computed upon the aggregate amount of the judgment recovered in Kansas from its date which included the costs of that proceeding, is not well taken. The interest was only computed at the legal rate here. Code, § 320, is not limited to domestic judgments. The costs of that proceeding were included in the judgment there rendered, and became a part thereof; said judgment also allowed interest thereon. The legal rate would be recoverable unless a lower rate was specified. See *Hopkins v. Shepard*, 129 Mass. 600; *Shickle v. Watts*, 94 Mo. 410; *Wetherill v. Stillman*, 65 Pa. St. 105.

The judgment of the superior court herein is affirmed.

ANDERS, C. J., and DUNBAR and HOYT, JJ., concur.

STILES, J., concurs in the result.

[No. 212. Decided July 7, 1891.]

JAMES B. FAULCONER AND ALMIRA O. FAULCONER V.  
MARIA A. WARNER AND ALEXANDER WARNER.

APPEAL—STATEMENT OF FACTS—BY WHOM SETTLED.

Under Laws 1889-90, p. 334, § 4, a statement of facts on appeal cannot be settled by the judge who tried the cause after he goes out of office, as there is nothing in the statute specially providing that judicial functions shall be retained for such purpose. (ANDERS, C. J., dissents.)

*Appeal from Superior Court, Spokane County.*

Motion by appellees to strike statement of facts from the record, and to affirm the judgment, because said statement

2	525
3	45
3	48
3	229
3	477

2	525
4	817
27*	274
30*	647

2	525
7	286
27*	274
31*	914

2	525
19	21

is not certified as a statement of facts by any officer authorized to certify the same.

*Fenton & Fenton, and Belt & Quinn, for appellants.*

*Turner & Graves, for appellees.*

The opinion of the court was delivered by

HOYT, J.—The statement of facts to support the appeal in this case was settled by the judge who tried the same after he had gone out of office, and his successor had assumed the duties thereof. For this, among other reasons, respondents move the court to strike such statement, and affirm the judgment of the court below. Our statute in relation to this matter provides that such statement shall be settled by the court or judge who tried the cause. Does this provision authorize the settlement of such statement by a private individual simply because at one time he was the court or judge who tried the cause? I think not. That the settlement of such statement is the exercise of a purely judicial function is conceded, but it is contended on the part of appellants that the language of the statute is broad enough to confer upon such private person such powers, their theory being that, by virtue of such statute, it must be held that the legislature intended that so much of the judicial power of the judge as was necessary for such purpose should be retained by him after he went out of office. I can see nothing in the language used by the legislature to warrant such a contention. The words “court or judge” cannot be held without too strained an effort to mean not only what they say, “the court or judge,” but also the person who was the court or judge on a certain day long past. In the absence of a statute expressly or by necessary intendment providing for the exercise of such powers by a judge after he had gone out of office, I am of the opinion that it would be

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July, 1891.] Dissenting Opinion — ANDERS, C. J.

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judicial legislation to hold that he had any such power. Appellants urge the hardship that must ensue from such a construction of our statute. I do not now decide that, under the circumstances of this case, there was no method provided by which such statement could have been properly settled; but even if this were so, and I should be of the opinion that there had been a failure of proper legislation upon that subject, that fact would not warrant this court in making a legislature of itself, and supplying the deficiency. It is true that, in the cases cited by appellants from the states of Wisconsin, Connecticut and Nebraska, the courts seem to have made such decisions as would warrant the contention in this case; but I am not satisfied with the reasoning of such cases. Besides, most of those decisions were put upon the express ground of long continued usage in the states where the decisions were rendered. The courts of Indiana, and other states not necessary to mention, have taken the other position, and the reasoning therein contained seems to me incontrovertible. See *Smith v. Baugh*, 32 Ind. 163; *Ketcham v. Hill*, 42 Ind. 64. When a judge goes out of office, he can retain no judicial functions, excepting such as it is specially provided by statute that he shall retain, and, under our statute, his power to settle a statement of facts is not so retained.

Several other reasons were assigned by respondents why this statement should be stricken, but the conclusion to which we have come as to this principal one makes a decision thereon unnecessary. The motion to strike must be granted, and, as that leaves nothing upon which the appeal can stand, the judgment of the court below will be affirmed.

SCOTT, DUNBAR, and STILES, JJ., concur.

ANDERS, C. J. (*dissenting*). — I respectfully dissent from the conclusion reached by the majority of the court. The duty of settling a statement of facts, which is to be made a

part of the record on appeal to the supreme court, is strictly statutory; and the law governing this case provides, among other things, that the party appealing may give notice to the opposite party or his attorney that, upon a day to be named in said notice, he will apply to the court or judge who tried the cause or made the decision, order or judgment complained of, at a place to be named in said notice, to settle and certify said statement of facts. It is further provided that, upon the day named in said notice, the said parties, or their attorneys, may appear before the said "court or judge;" and it shall be the duty of said court or judge to settle what is the proper statement, and to certify the same. See Laws 1889-90, p. 334, § 4. It seems to me that, when the statute expressly declares that this duty shall be performed by the court or judge who tried the cause or made the decision, order or judgment complained of, this court ought not to say that, notwithstanding the plain and unambiguous language used by the legislature, the judge who actually tried the cause and rendered the judgment appealed from, and who is the only person who is presumed to know the very facts to be settled and certified, cannot perform that most important duty, simply because he has ceased, since the trial, to hold the office with which he was clothed at the time he became possessed of the facts. I cannot conceive how the individual who signed and certified the statement of facts in question is any less the judge who tried the cause since his retirement from the bench than he would be if he had retained all of his judicial functions. Certainly there is no other judge who tried the cause, and no other judge or "court" cognizant of the facts which occurred on the trial, and, if the judge who presided at the trial cannot certify to what took place before him, the right of appeal, in such cases as this, will be greatly clogged with difficulties, if not altogether destroyed. There seems to be no method

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July, 1891.]      Dissenting Opinion — ANDERS, C. J.

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pointed out by statute whereby the successor of the judge who tries a cause may be made to know the facts to be settled and certified by the "court or judge," and this fact alone is a cogent reason for concluding that the legislature did not intend to cast that duty upon him. Whether the settlement of such statement is the exercise of a judicial function or not, it is nevertheless competent for the legislature to authorize the doing of it by a judge after he has gone out of office. This was so held in *Johnson v. Higgins*, 53 Conn. 236 (1 Atl. Rep. 616). It was contended in that case that such an act of the legislature was unconstitutional, and that the act of signing the finding and statement upon appeal was a judicial act, and must have been done by the judge while in office. And STODDARD, J., in delivering the opinion of the court, said:

"Even if it be admitted that the act of the judge in signing the finding on appeal is a judicial act in the sense claimed by the plaintiff, and that the act was done after he had ceased to be such judge, no authority has been brought to our attention denying the legislature the power implied in the law in question. No substantial reason is given why the legislative power is incompetent to authorize judicial officers, after their term of office, to complete the history of trials had, and to give permanent and official form to facts found during their term of office. Such acts are rather clerical than judicial."

• In Wisconsin it has been the uniform practice for judges, after their term of office, to settle bills of exceptions, on the ground that, if not permitted so to do, a party would be deprived of the benefit of an appeal. *Fellows v. Tait*, 14 Wis. 156; *Davis v. Village of Menasha*, 20 Wis. 194; *Hale v. Haselton*, 21 Wis. 320. The courts of Indiana take the opposite view of the question, and hold that such acts are judicial, and can only be done by a judge while in office; but as to what the statutes of that state are upon the subject, I am not informed. In *State v. Barnes*, 16

Neb. 37 (19 N. W. Rep. 701), under a statute providing for the settlement of bills of exceptions by "the judge who heard or tried the case," or, in case of his death, absence or physical disability to act, then by the clerk, it was held that the judge who tried the case not only had the power, but it was his duty, after his term of office had expired, to settle and allow a bill of exceptions, and that, in a proper case, *mandamus* would lie to compel him to do so. And in the course of the opinion by REESE, J., at page 40, it is said:

"The duty of settling the bill now being imposed upon the person 'who heard or tried the case,' it seems clear to us that the duty attaches to the incumbent at the time of the trial, and continues until it is performed, subject to the exceptions contained in the statute."

To my mind, our statute is equally as clear as the one under consideration in that case, and all the reasons there given by the court are applicable to the case at bar. For the foregoing reasons, I am of the opinion that the motion to strike the statement of facts from the files should be denied.

[No. 216. Decided July 8, 1891.]

THE BOARD OF HARBOR LINE COMMISSIONERS, W. F. PROSSER, EUGENE SEMPLE, FRANK H. RICHARDS, H. F. GARRETSON AND D. C. GUERNSEY V. THE STATE, *on the Relation of Henry L. Yesler.*

RIPARIAN RIGHTS—TIDE LANDS—WHARVES—HARBOR LINES—CONFLICT OF LAWS—PROHIBITION.

A riparian owner of lands, by reason of such ownership, can assert no valuable rights below the line of ordinary high tide, as against the state. The provision of the constitution (art. XVII, § 1), that no person shall be debarred from asserting his claim to vested rights in the courts of this state, applies only to some special right held

2	530
4	7
4	816
27*	550
29*	938
30*	735
3	530
5	159
27*	550
31*	462
2	530
7	119
27*	550
34*	427
2	530
13	520
2	530
120	504
2	530
24	501
2	530
27	605



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Statement of the Case.

by a riparian owner by way of improvements made under express or implied license from the representative of the sovereign power, and not to any vested right incident to riparian ownership.

Where a riparian owner has no interest in tide land, but simply in a wharf upon the land, including the land under the wharf within the harbor lines authorized by the state is not such a taking or damaging of the wharf as will entitle the owner to compensation, nor does such action cast a cloud upon his title.

The rights of the state in tide lands are subject to the paramount right of the United States to regulate commerce and navigation; consequently, the United States, by its proper officers, is the only party that can interfere in case of state legislation being opposed to that of congress upon the subject of navigation and harbor lines; and, until the contrary appears, all such legislation must be presumed to be in the interest of commerce and navigation.

As the writ of prohibition will be granted only in a clear case, when no other remedy is available, the court is not authorized to grant it for the purpose of preventing the harbor commission from defining harbor lines.

*Appeal from Superior Court, King County.*

This is an appeal from the judgment of the superior court of King county, in a proceeding by the relator for a writ of prohibition against the respondents, by which judgment the motion of the respondents to quash the alternative writ of prohibition first issued having been treated as a demurrer to the affidavit upon which the application for the alternative writ had been granted, was overruled, and the writ of prohibition was made absolute. The substance of the facts made to appear by that affidavit is, that the relator, a resident of the city of Seattle for upwards of thirty years, has during all that time been and still is the owner of certain upland property abutting upon the shore of Elliott Bay (the harbor of the city), and of the premises commonly known as the Yesler wharf and dock connected with and extending from said upland into the waters of the bay; that he erected said wharf and dock upwards of thirty years ago, at an expense exceeding \$100,000, in aid of commerce and navigation, and down to June 6, 1889, maintained the

same for those purposes; that immediately after the great fire in said city of June 6, 1889, which destroyed said wharf and dock, he began rebuilding the same, and had rebuilt them at an expense exceeding \$56,000, and still maintains the same as aids to commerce and navigation, in the promotion of which they have always been largely instrumental; that he has completed such rebuilding of the wharf and dock upon the faith of the protection afforded to him by the act of the legislature of the State of Washington, entitled "An act for the appraising and disposing of the tide and shore lands belonging to the State of Washington," approved March 26, 1890, and is entitled, under that act, to the right of priority of purchase of the shore lands occupied by said improvements; that the respondents, the board of harbor line commissioners of the state, are about to take final action in the locating and establishing of the harbor lines within the limits of the city of Seattle, and, as the relator is informed and believes, they propose, and are about to locate and establish such harbor lines in such a way as to include within such harbor lines his improvements above mentioned; that such extension of such harbor lines over said improvements is an attempt on the part of the board of harbor line commissioners to exercise unauthorized power, and to do an act which is not within their jurisdiction, and they have no authority or jurisdiction under the laws of the State of Washington, as the relator is advised and believes, to embrace or include within the harbor lines to be located and established in front of the city of Seattle, the wharves, docks or other improvements made therein; but that if the commissioners are not prevented by a writ of prohibition of the court from extending such harbor lines over said wharf and dock, and from filing the plat thereof in the office of the secretary of state, or the duplicate thereof in the office of the clerk of the city of Seattle, they will so extend the same and thus deprive him of the

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July, 1891.] Opinion of the Court — HOYT, J.

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use and benefit of his said wharf and dock, and cloud his title to the same in such a manner as greatly to embarrass and hinder the plaintiff in the legitimate use of his said property; and that the relator has no remedy at law or in equity except the writ of prohibition applied for. The writ was issued on October 28, 1890, and the judgment appealed from was entered on February 7, 1891.

*W. C. Jones*, Attorney-General, and *Eugene Semple*, for appellants.

*Thomas Burke*, and *J. C. Haines* (*Burke, Shepard & Woods*, of counsel), for appellee.

The opinion of the court was delivered by

HOYT, J.—The most important questions in this case are the same as those discussed and covered by the opinion in the case of *Eisenbach v. Hatfield*, ante, p. 236 (decided at the last session of this court). Yet in view of the immense interests involved in the principles therein announced we have again gladly listened to the able arguments of counsel made before us, and have carefully examined the exhaustive briefs filed, and again reviewed all of the questions decided in the case above cited; and it is only necessary for me to say that the opinion of the court has not been changed by such re-examination. The court is still of the opinion that, as against the state, a littoral owner, simply as such owner, can assert no valuable rights below the line of ordinary high tide.

The somewhat careful examination which I have given this case has confirmed my opinion that at common law the sovereign power (resting in England in parliament) could take such lands without compensation, and absolutely exclude the littoral proprietors from any rights thereto. In fact, such is conceded to be the power of parliament by nearly all of the courts. Even those which have taken

the strongest ground against the doctrine of the case above cited have admitted such to be the rule. Note the argument of Chancellor ZABRISKIE in his dissenting opinion, *Stevens v. Railroad Co.*, 34 N. J. Law, 554 (3 Am. Rep. 269). While conceding this, they say parliament has this power because it is all-powerful, and can legislate as it pleases. This is true, but why is it true? Simply because in it is embodied the sovereign power. In my opinion, the same power vested in parliament and king in England is here vested in the people, who are fully as much sovereign here as parliament and king there. Here the people of a state are absolutely sovereign, except as controlled by the constitution of the United States; and I do not think that it can be successfully contended that the powers of the people of the states have been thus controlled as to the questions here involved. I am unable to find any clause of the constitution of the United States looking to such control, and, as I read the decisions of the United States supreme court, it has expressly decided that the states are in no wise controlled in this matter.

Acting within their sovereign power, as above recognized, the people of this state, in forming a constitution, saw fit to assert the title of the state to the lands in question, and having done so they are the only power that can interfere with such title. But it is said that, while such assertion of title is made in the constitution, it is so made subject to vested rights of the riparian owner to be asserted in the courts. I am of the opinion that this vested right cannot be held to be such as is incident to the riparian owner simply as such, but must be held to apply only to some special right held by such owner by way of improvements made under express or implied license from the representative of the sovereign power. To hold that the former was intended, would practically destroy the title of the state, and would, therefore, be inconsistent with the as-

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Opinion of the Court—HOYT, J.

section of such title; while the latter construction will give force to every word, and make the provision in its entirety a consistent one. When the people say that they assert the state's title, it must be held to mean the entire and exclusive title. Of course the rights of the state, as above stated, are subject to the paramount right of the United States to regulate commerce and navigation, as to which I shall say a word later on.

The doctrine of the case of *Eisenbach v. Hatfield*, above cited, must obtain, and under it the rights of the parties hereto must be determined. It will thus be seen that the petitioner has no rights to the land in controversy, and at the most the only vested right he has is in the wharf constructed thereon; and for the purposes of this case, I shall assume (though we do not now decide that question) that the petitioner has such a right in such wharf that it could only be taken from him after compensation paid therefor. But will this right aid him in this controversy? Will the fact that he has a right to be compensated for his said improvements allow him to prevent the carrying out of a great state policy in the establishment of harbor lines? Can it be contended that this work must stop, or that the line must be laid around the several wharves which have been erected by riparian owners? I think all these questions must be answered in the negative. The riparian proprietor, as we have seen, has no interest in the land, but simply in the wharf on the land; and, this being so, it cannot be said that simply including the land under the wharf within the harbor lines is such a taking or damaging of the wharf as will entitle the owner to compensation. It does not follow from such including within the harbor line that the state has or ever will interfere with his ownership or possession of said wharf. If his property is neither taken nor damaged, the only ground upon which he can ask the interposition of the courts is, that a cloud is about to be

cast upon his title. Upon this question I am of the opinion that his title is not of a nature to be clouded, being only a right to the structure upon the land without any right in the land itself. But, even if it were, the proceedings complained of could constitute no cloud thereon, for, if the contention of petitioner is correct, the harbor line commission could not lawfully act until legislation had been had, providing a method by which the vested rights of all riparian owners who had wharfed out could be protected; and if this is so, then their want of authority to act is known to every one, and must be held to be apparent from the face of the proceedings, and therefore their acts could not constitute a cloud. If, on the other hand, they have authority to act at all in advance of such legislation, they must be held to have authority to lay their lines across the wharf of petitioner, and all others similarly situated.

I think that the argument of counsel, that this legislation is opposed to that of congress enacted upon the subject of navigation and harbor lines, cannot be sustained. All such legislation must be presumed to be in the interest of commerce and navigation until the contrary appears. Besides, the United States, by its proper officers, is the only party that could interfere in such a case.

The extraordinary writ of prohibition should only be granted in a clear case, and when no other remedy is available; and I am of the opinion that petitioner has no cause of complaint; and, if he has, I am not satisfied that the ordinary proceedings in law or equity will not ultimately completely protect his rights.

The judgment must be reversed, and the cause remanded with instructions to dismiss the petition.

ANDERS, C. J., and SCOTT and DUNBAR, JJ., concur.

STILES, J. — I concur in the disposition of this case, as I look upon the threatened action of the board of harbor

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July, 1891.]Opinion of the Court — SCOTT, J.

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line commissioners in the filing of a map of the harbor line of the city of Seattle as a clearly legitimate exercise of the power of the state to regulate and control the harbors within its limits to the extent of fixing the point beyond which wharves must not extend. In *Com. v. Alger*, 7 Cush. 53, the like action was upheld, although the soil beneath the wharf complained of was the property of the appellant in fee under the Massachusetts ordinance of 1647. As to the consequences which may follow through the action of the tide land commissioners, I think them too remote for adjustment or discussion in the present proceedings.

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[No. 219. Decided July 8, 1891.]

ELIJAH LEISURE V. WILLIAM H. KNEELAND AND F. P.  
KNEELAND.

## INSOLVENCY — DISCHARGE — FORECLOSURE OF MORTGAGE.

Where a decree of foreclosure was rendered against a debtor a few days subsequent to his discharge in insolvency, but before the order of discharge was entered, and the debtor failed to apply to the court to limit plaintiff's recovery in the foreclosure proceedings to the proceeds of sale thereunder, the discharge will not prevent a recovery of any deficiency remaining after sale of the mortgaged premises.

*Appeal from Superior Court, Mason County.*

The facts are sufficiently stated in the opinion.

*C. W. Hartman*, for appellant.

*Allen & Ayer*, for appellees.

The opinion of the court was delivered by

SCOTT, J.—In December, 1884, the respondents filed petitions under the insolvent debtor act, in the territorial

district court of the second judicial district holding terms at Olympia, to procure a discharge from their indebtedness, and on June 9, 1885, they each obtained an order in said proceedings discharging them as prayed for. These orders were entered on the journal of said court June 17, 1885. Prior thereto an action was pending against them in said court, brought by appellant, to recover the amount due upon a certain note executed to him by the respondents, and to foreclose a mortgage upon lands given to secure the payment thereof. On June 16, 1885, judgment was rendered in the foreclosure suit in favor of appellant for the full amount of the mortgage debt, with interest thereon, thereafter, at the rate of eight per cent. per annum. A sale of the lands mortgaged was ordered, and the proceeds arising therefrom directed to be applied upon the judgment. July 27, 1885, the real estate was sold, and the proceeds applied accordingly, leaving a balance of said judgment amounting to \$1,293.95 unsatisfied. August 12, 1889, appellant brought this suit to recover another judgment for said balance. The respondents answered, admitting that the judgment was obtained against them, and that the balance claimed had not been paid, but set up their discharges obtained in the insolvency proceedings as a bar to the action. Appellant replied, alleging fraud upon the part of respondents in procuring their discharges, and denying that his claim was among those included therein. A trial by jury was had, resulting in a verdict and judgment for the respondents.

No question was raised as to whether such an action would lie upon a domestic judgment. The main point raised by appellant being sufficient to dispose of the case, other questions presented will not be passed upon. Appellant contends that the discharges in insolvency were prior in point of time to the judgment rendered in the foreclosure suit, and that consequently they constituted no



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Syllabus.

defense to this action. This point is well taken. The discharges took effect June 9, 1885, the day they were granted, and not at the later day, when they were entered in the journal. The appellant's said action was then pending, and, had the respondents been entitled to a release therein from any liability for a deficiency that might remain after a sale of the mortgaged lands, to have availed themselves thereof they should have applied to the court to limit the appellant's recovery therein to the proceeds of such sale. This was not done, and, the appellant's judgment being subsequent to the discharges, it was not barred thereby, even though such discharges were regularly obtained. See *Rahm v. Minis*, 40 Cal. 421.

Judgment reversed.

ANDERS, C. J., and HOYT, DUNBAR, and STILES, JJ.,  
concur.

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[No. 224. Decided July 8, 1891.]

D. J. CALLAHAN *et al.* v. H. E. HOUGHTON *et al.*

APPEAL—NOTICE—FILING TRANSCRIPT.

Where the court in a cause of equitable cognizance delivered his findings and decree to the clerk to be filed, and defendant thereupon gave notice in open court of appeal, and ordered and paid for a transcript, which the clerk failed to prepare and file within thirty days thereafter, on the ground that he had not entered the decree because plaintiff had not paid the fees therefor, no laches can be attributed to the defendant.

*Appeal from Superior Court, Spokane County.*

Motion by appellees to dismiss appeal, and affirm the decree.

*W. C. Jones, and Belt & Quinn, for appellants.*

*Turner & Graves, for appellees.*

The opinion of the court was delivered by

STILES, J.—This was a motion to dismiss an appeal, and affirm a decree, for failure to cause a transcript to be prepared within thirty days after the notice of appeal. Upon the hearing of the motion it appeared that the judge of the court below, on the 17th day of February, 1891, in open court, handed to the clerk his findings of fact and conclusions of law, and the form of a decree in the cause (which was one of equitable cognizance) to be filed, and immediately thereupon the defendant gave notice of appeal, ordered a transcript, and paid the clerk his fees therefor. About March 12th, appellant applied to the clerk for the transcript, but was informed that he had not filed the judge's findings, or entered the decree, because the plaintiff had not paid the fees therefor, and declared that he would not do so until the fees were paid. The fees were not paid until April 23d, nor was the decree entered until then. Defendant then gave a new notice of appeal. In our opinion, if the notice of appeal, when given, was of any force, there was no laches on the part of the defendant, and the motion cannot prevail.

Motion denied.

ANDERS, C. J., and HOYT, SCOTT, and DUNBAR, JJ., concur.

July, 1891.]

Opinion of the Court — STILES, J.

[No 228. Decided July 8, 1891.]

## THE CITY OF SPOKANE FALLS v. A. P. CURRY.

## JUDGMENT BY DEFAULT — MOTION TO SET ASIDE — SERVICE OF COMPLAINT.

A motion to set aside a judgment by default is within the discretion of the trial court to grant or deny.

Judgment upon failure to answer can be entered, as of course, without proof of the plaintiff's demand, under Code 1881, § 289, subdivision 1, only where the summons and complaint have been served upon the defendant, and proof of such service filed with the clerk; and § 289 is in no way modified or repealed by the act of February 2, 1888, which makes it no longer necessary that a copy of the complaint be served in order to acquire jurisdiction over the person of a defendant.

*Appeal from Superior Court, Spokane County.*

Action by A. P. Curry against the city of Spokane Falls to recover for services as police justice. Judgment for plaintiff by default on defendant's failure to answer. Motion by defendant to set aside the judgment on the ground that he failed to answer because he thought the city had no meritorious defense, but subsequent to default he had learned that the city had what he believed to be a good, sufficient and legal defense. Motion denied.

*P. F. Quinn, James B. Jones, and C. S. Voorhees, for appellant.*

*Turner & Graves, and W. C. Jones, for appellee.*

The opinion of the court was delivered by

STILES, J.—Respondent obtained a default judgment against the appellant, and subsequently, upon affidavit of its city attorney, the latter sought to have the judgment set aside, and to be permitted to appear and defend. The motion to set aside was denied, and the appeal is here upon

2	541
4	764
27*	477
81*	84
2	541
5	302
27*	477
81*	752
2	541
9	678
27*	477
38*	206
2	541
10	419
27*	477
39*	119
2	541
30	228
2	541
39	376

two grounds, viz.: (1) Error in refusal to set aside the judgment upon the ground mentioned; and (2) error in entering judgment *pro confesso*, where no copy of the complaint had been served on the defendant. Upon the first ground we cannot interfere, as it was within the discretion of the court entirely whether to grant the motion or not. Besides which, there was little merit in the affidavit, which showed no more than neglect on the part of the city's officers; and the affidavit and proposed answer are not properly here, they not having been made a part of the record by statement or bill of exceptions. *Windt v. Banniza, ante*, p. 147.

But upon the second ground we are constrained to hold with the appellant. Section 289, Code 1881, subdivision 1, provides for the only instance where judgment can be entered upon failure to answer, as of course, without proof of the plaintiff's demand. The prerequisite is that the summons and complaint shall have been served upon the defendant, and that proof of such service shall have been filed with the clerk. No change in this law has been made. The respondent urges that because the act of February 2, 1888 (Laws 1887-8, p. 24), made it no longer necessary, for the acquirement of jurisdiction over the person of a defendant, that a copy of the complaint be served, we should therefore hold that § 289 was *pro tanto* repealed or modified. But the reason of the matter does not seem to be with that contention. The two things have no relation whatever to each other, and there is no evidence that the legislature intended to make any change in the proceedings upon application for judgment. We cannot presume that there was other service than is shown by the record, for the sake of the general rule that courts of record proceed regularly. The return of service clearly shows service of the summons only, and the order for judgment shows no testimony to have been taken or considered.

The judgment must be reversed, and leave granted to

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the appellant to apply to the court below to set aside the default, under § 290 of the code.

ANDERS, C. J., and HOYT, SCOTT, and DUNBAR, JJ.,  
concur.

[No. 211. Decided July 9, 1891.]

JOHN WILSON V. THE CITY OF SEATTLE *et al.*

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENTS  
—NOTICE—RIGHT OF ACTION—CERTIORARI.

When there is no remedy by appeal by which the validity of a street assessment may be contested, *certiorari* is the proper method of reviewing the proceedings therefor.

Where proceedings were begun for the improvement of a street in the city of Seattle while the charter of 1886 and the ordinance thereunder were in force providing that the assessment therefor should be according to the value of the property abutting on the improvement, and subsequent thereto, but prior to the levying of the assessment, the old charter was superseded by the charter of 1890 providing that the expense of making street improvements should be levied according to the frontage of property on the improvement, an assessment according to value is unauthorized and void.

Where the ordinance under which a street improvement is authorized provides that notice of the assessment therefor shall be published in a daily newspaper for ten successive days, notice according to the terms of the ordinance is absolutely necessary: and there can be no presumption, in such a case, that due notice was given.

Article 15, § 8 of the charter adopted by the city of Seattle in 1890 providing that "no action shall be brought or maintained to test or question the validity of any assessment unless the plaintiff shall first pay into court the amount of the assessed tax," is not within the powers granted to cities of the first class by the constitutional delegation of authority to them to frame their own charters.

*Appeal from Superior Court, King County.*

*Certiorari* to review the proceedings of the city council of the city of Seattle in the matter of the improvement of

2	543
4	491
27*	474
30*	733
2	543
5	484
5	487
6	315
6	371
27*	474
32*	105
32*	1002
33*	385
33*	963
2	543
8	320
27*	474
36*	27
2	543
42	374

Twelfth street in said city. The petition names as defendants the mayor, clerk, comptroller, assessor, board of delegates and board of aldermen of the city of Seattle. The superior court quashed the writ of review, affirmed the proceedings of the city council, and rendered judgment against plaintiff for costs. Plaintiff appeals.

*Tustin, Gearin & Crews*, for appellant.

*Orange Jacobs*, for appellees.

The opinion of the court was delivered by

STILES, J.—Appellant seeks by *certiorari* to quash an assessment upon certain real estate fronting upon South Twelfth street, in the city of Seattle, for grading and sidewalks. In the court below a demurrer to the petition was overruled, and the writ issued; but upon the return the proceedings of the city council, including the levy, were affirmed.

The first point we are required to pass upon is the objection of the respondents that *certiorari* is not the proper remedy in this case. The improvement for which this assessment was laid was undertaken by the city of Seattle in June, 1890, while the charter of 1886 was in force. Under that charter (§ 10, Acts 1886, p. 243) such assessments were to be collected by an action at law or a suit in equity in the name of the city, or the officer or contractor to whom it might be directed that payment should be made. Had that law continued in force, we should probably have held that the opportunity thus given to the owner of assessed real estate afforded the proper method and time for contesting the assessment to the exclusion of the remedy by *certiorari*. *Garvin v. Daussman*, 114 Ind. 429 (5 Am. St. Rep. 637; 16 N. E. Rep. 826). But under the charter of the city of Seattle, adopted October 1, 1890, the act of 1886 was completely superseded, and a new method of collecting such assess-

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July, 1891.] Opinion of the Court—STILES, J.

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ments was provided, viz., by sale by the treasurer. Charter 1890, art. 8, § 8; *Id.*, art. 9, § 24. This renders it necessary to examine the law of the case to see whether the appellant is provided any remedy for the wrong he complains of, by appeal or otherwise; and there seems to be none at all. When there is no remedy by appeal, *certiorari* is the ordinary method of reviewing such cases. Elliott, Roads & S., p. 279, *et seq.*

The issuance of the writ was therefore proper; and the next question is, what was the scope of the inquiry to be made upon the return, the superior court having, under the constitution (article 4, § 6), jurisdiction to issue writs of *certiorari* in the common-law sense? The common-law writ of *certiorari* is the proper remedy upon which to correct the errors of all inferior tribunals where they have exceeded their jurisdiction or proceeded illegally and there is no appeal or other mode of reviewing or correcting their proceedings. Wood, *Mandamus*, etc., 174; *Camden v. Bloch*, 65 Ala. 236; *State ex rel. Moreland v. Whitford*, 54 Wis. 150 (11 N. W. Rep. 424); *People ex rel. Clapp v. Board of Police*, 72 N. Y. 415. We believe this to be the general rule in this class of cases, though there is some diversity of opinion on the point as to whether the inquiry should extend beyond the question of jurisdiction. Upon the return to the writ, therefore, it was incumbent upon the court to examine the record to determine—(1) whether the city had jurisdiction; (2) whether the proceedings were according to the statutes and ordinances. By her charter of 1886, the city of Seattle had power to order the improvement of streets at the cost of abutting owners, either upon petition of the owners of more than half the property to be affected, or, in the absence of such a petition, by a unanimous vote of all the members of the council present at a regular meeting. The charter left the matter of making regulations for the exercise of this power

to the city; and about June 1, 1886, an ordinance (No. 737) for that purpose went into effect. This ordinance provided for assessment districts extending a certain distance on each side of the street to be improved, and that the expense should be assessed upon property in the district according to its value. It appears that after several petitions of property owners for the improvement of different sections of South Twelfth street had been presented to the council, and after some of them had been "granted," the council on the 25th day of June, 1890, passed ordinance No. 1413, providing for the grading, etc., of South Twelfth street from Yesler avenue to Stacy street, by the unanimous vote of seven councilmen, being all the members present at a regular meeting held on that day. The body of the ordinance provided that it should take effect from its passage, approval and publication, and that the work should be completed within 180 days from the date of the execution of the contract for the improvements. The record is silent as to whether any contract was made, and as to whether the work, or any part of it, has ever been done. It is meager in other particulars also, where, in view of the importance of the proceeding, care and exactness would naturally be expected. But, as but two points are urged on this appeal, we shall confine our remarks to them. Upon the passage of ordinance No. 737 in 1886, it was incumbent upon the municipal authorities to adhere strictly to its provisions in making assessments. Sections 4-7 of ordinance No. 737 were as follows:

"SEC. 4. That, within twenty days after the council shall have made an order for the improvement of any street, highway or alley, the city surveyor shall prepare and file with the clerk a plat of the street or streets, highway or highways, alley or alleys so to be improved, and of the real estate subject to assessment therefor, showing the lines of such lot or other smallest subdivision thereof; and within ten days thereafter the city clerk shall prepare and file in



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his office an assessment roll for each separate assessment district, if several streets, highways or alleys are to be improved at the same time, upon which assessment roll each lot or other smallest subdivision of real estate in such district shall be listed in the name of the owner thereof, if known, or as 'unknown owner,' and assessed at the actual cash value thereof: *Provided*, That in all cases the valuation to be placed on each lot in such assessment roll shall, as far as practicable, be the same as that placed upon the same property upon the last preceding annual assessment roll and tax list for the city of Seattle, and such assessment roll shall be open to public inspection at the clerk's office during business hours from the time of filing thereof until the day of the meeting of the council for the equalization thereof, as hereinafter provided.

"SEC. 5. That within three (3) days from the filing of such assessment roll, the clerk shall advertise a notice in a daily newspaper of the city to the effect that such assessment roll (describing it) has been filed in his office, and that the same is open to inspection, and that any person finding himself aggrieved by such assessment may apply to the common council to have the same corrected at a meeting of the council to be designated in such notice, which meeting shall be the first regular meeting after the last publication of such notice; and such notice shall be published for ten days in each successive issue of said newspaper.

"SEC. 6. That at the first regular meeting of the common council after the last publication of such notice, the common council shall equalize such assessment, and shall hear all complaints concerning such assessment roll, and determine the same, and may raise or lower the valuation of any lot or parcel of real estate listed in such assessment roll, so as to make the assessment equal and uniform, as near as may be, upon all property in the district; and shall, if any lot or parcel of real estate within such district be found to have been omitted from such assessment roll, list the same, and place a just valuation thereon: *Provided*, That no lot or parcel of real estate omitted by the clerk shall be listed, nor shall the valuation of any lot or parcel of real estate be raised by the council without the owner's consent, until at least twenty-four hours after a written notice of

such proposed change shall have been served upon the owner or his agent, if such owner or agent can be found within the city, and if not so found, then a notice of such proposed change in the assessment roll must be first published for at least three days in a daily newspaper of the city; and the council may adjourn from time to time, if necessary, until the equalization of such assessment roll shall be completed.

“SEC. 7. That as soon as practicable after such assessment shall be equalized, and the nature and extent of assessment districts shall have been fixed, and the cost of the improvement shall have been ascertained, the council may by an order, fix the rate of assessment for such district, or for each of such districts, as the case may be, so as to raise the necessary amount to pay for such improvement in accordance with the provisions of this ordinance.”

On July 31, 1890, the city clerk, according to the return, commenced the publication in the *Seattle Evening Times* of a notice of the filing of the South Twelfth street improvement assessment roll, and that on Friday evening, August 15th, the council would sit to hear complaints and equalize the assessment; but there is no proof that the notice was published for ten consecutive days, or that it was published at all, as required by the last clause of § 5. The record does not show that the council sat August 15th, or that the matter of this assessment was considered; nor did anything further transpire in the matter until January 14, 1891, when ordinance No. 1595 was passed, as follows:

“ORDINANCE NO. 1595.

“AN ORDINANCE to provide for the levy of the rate per cent. for the improvement of South Twelfth street from Yesler avenue to Stacy street, in the city of Seattle.

“*Be it ordained by the city of Seattle as follows:*

“SECTION 1. That a tax of 542½ mills per dollar be levied on the real property, excluding improvements, in the district provided for by the ordinance No. 1413, to pay the cost of grading and sidewalking of South Twelfth street from Yesler avenue to Stacy street, in the city of Seattle.

“SEC. 2. The city comptroller and assessor is hereby

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empowered, authorized and directed to extend said rate per cent. on the property within the district fixed by ordinance No. 1413, and to collect the same according to law.

“SEC. 3. This ordinance shall take effect and be in force from and after its passage, approval and publication.”

In the mean time the charter of October 1, 1890, had been adopted, and an entirely new system of street assessments provided, under which the expense of making street improvements was to be levied, not according to the value of the property abutting, but according to its frontage on the improvement. Charter, art. 8, § 7. Under the old charter (§ 10) the lien of assessments did not attach until the levy was made. We are therefore clearly of the opinion that the new charter was, from the date of its adoption (October 1, 1890), the law of the case, and that the assessment in 1891, according to value, was unauthorized and void.

Returning, now, to the question of the notice, it was argued that, even if notice was necessary, the recital by the city clerk in his return that the notice was advertised in the *Seattle Evening Times*—“date of first publication, July 31, 1890”—was sufficient basis for the court to presume that the notice was published for ten days, and that proof of the fact had been made when the council proceeded to make its levy, as public officers are presumed to proceed according to law. Notice was absolutely necessary; for, although the statute did not require it, it is a general principle of law, too well known for comment, even, that in every proceeding whereby these special assessments are levied it is necessary as a constituent of due process of law; besides which, the ordinance No. 737 did require it in terms. When the council met on the 15th day of August (if it did meet then), and the matter of this assessment came up, the first question before it was, had the notice been published for ten successive days? It could know that fact in no other way than by the certificate or affidavit

of the publisher; and until that document lay before it, it had no jurisdiction to proceed. *Gatch v. City of Des Moines*, 63 Iowa, 721 (18 N. W. Rep. 310). Presumptions are not admissible in cases of this kind, where the property of the citizen is taken, and where jurisdiction is acquired only by strict compliance with the law.

But it is urged that the appellant was barred of his right to contest the lien upon his property because he did not pay into court the amount assessed to him, in accordance with § 8, art. 15, of the new charter. That section reads as follows:

“No action shall be brought or maintained in any way to test or question the validity of any assessment, proceeding, certificate or tax deed unless the plaintiff shall first tender and pay into court the amount of the assessed tax, together with all interest, penalties, costs and damages thereon.”

It occurs in the article devoted to the duties of the corporation counsel and city attorney, without connection with or relation to any other portion of the article. It is a somewhat curious provision, but is not unprecedented in legislation. *Wilson v. McKenna*, 52 Ill. 48; *Reed v. Tyler*, 56 Ill. 292. We can hardly agree that in the city of Seattle there is to be no way of avoiding the payment of an illegal assessment except by paying it, as we do not believe that the constitutional authority delegated to cities of the first class to enact their own charters contemplates such a sweeping deprivation of ordinary legal rights. The property assessed is abundant security for the assessment, if it is a valid one; and, if it is invalid, the owner should be put in no such disadvantageous position. According to these views, the levy and all proceedings in the matter of the South Twelfth street assessment, as far back as and including the notice, must be quashed; but, as the improvement was legally ordered, this disposition of the matter will be

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without prejudice to the city to make a new assessment and levy, if it can be done, under the charter of 1890.

Judgment reversed, and cause remanded to the court below for proceedings in accordance herewith.

ANDERS, C. J., and DUNBAR and SCOTT JJ., concur  
HOYT, J, dissents.

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[No. 268. Decided July 10, 1891.]

*Ex parte* C. S. JONES.

2	551
26	824

CRIMINAL LAW—APPEAL—CUSTODY OF PRISONER.

Under Laws 1891, p. 350, §§ 40, 41, when a defendant convicted in a criminal action gives notice of appeal, he is entitled to remain in the county jail pending appeal, if he cannot procure bail, in a bailable offense, and ought not to be transported to the penitentiary.

The sheriff of the county where the prisoner was tried is his rightful custodian, and the warden of the penitentiary should, upon demand, deliver the prisoner to the sheriff.

*Original Application for Habeas Corpus.*

*John C. Stallcup*, for petitioner.

The opinion of the court was delivered by

STILES, J.—The petitioner was convicted of the crime of grand larceny in the superior court of Pierce county, and on the 24th day of June, 1891, was sentenced to be imprisoned in the state penitentiary at Walla Walla for the term of three years. He immediately gave notice of an appeal to this court, and his bail was fixed at \$5,000. But on the next day he was transported to Walla Walla, and delivered to the custody of the warden of the penitentiary, where he has since been confined. He seeks, by a writ of *habeas corpus*, to be released from the custody of the war-

den. By § 40 of the act of March 9, 1891 (Laws 1891, p. 350), an appeal by the defendant in a criminal action stays the execution of a judgment of conviction. By § 41 of the same act, upon giving the bail to be fixed by the court, this petitioner was entitled to be released entirely from confinement until the determination of his case on appeal. In the mean time his notice of appeal entitled him to remain in the county jail if he did not procure bail.

It appears that there is some question as to the authority of the warden to return the prisoner to the jail of Pierce county, but there is no question about that of the sheriff of Pierce county, who is his rightful custodian, to go and get him and return him there. Therefore the order will be that the warden, upon demand of the sheriff of Pierce county, within five days after service of the order upon him, deliver the prisoner to the sheriff, and that, in default of such demand, the warden release and discharge him forthwith. A copy of the order to be forthwith served on the sheriff.

ANDERS, C. J., and DUNBAR, SCOTT, and HOYT, JJ., concur.

2	552
3	207
2	552
4	819
27*	449
30*	1061
2	552
7	500
7	508
27*	449
35*	375
35*	383

[No. 185. Decided July 14, 1891.]

JOHN G. LYBARGER v. THE STATE OF WASHINGTON.

CONSTITUTIONAL LAW—EX POST FACTO LAW—INFORMATION—SEPARATION OF JURY—WEIGHT OF TESTIMONY.

A law changing the mode of procedure in prosecutions for crime from an indictment to an information, does not contain any of the elements, or respond to any of the accepted definitions of an *ex post facto* law, although the offense under prosecution may have been committed prior to such change in the law.

Under Code 1881, § 278, providing that misconduct of the jury shall be shown by affidavit on motion for new trial, the miscon-

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July, 1891.] Opinion of the Court—DUNBAR, J.

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duct of the jury in separating and each going his own way without the custody of the court, must be shown by affidavit where the record is silent as to whether such separation was by consent of the parties, otherwise it will not be considered by the supreme court on appeal. (ANDERS, C. J., and SCOTT, J., dissent.)

Where there is sufficient evidence to sustain the verdict of the jury, the supreme court will not pass upon the weight of testimony.

The supreme court will, on suggestion of a diminution of the record of a case before the court, order the record supplied; but after appellant has rested his case on certain points of the record, he will not be granted a rehearing upon an amended record. (Opinion on rehearing.)

*Appeal from Superior Court, Thurston County.*

Information against John G. Lybarger for the crime of seduction. The crime was committed in the year 1889, prior to the admission of Washington Territory to statehood. The information was filed in the year 1890, and defendant was tried and convicted thereunder, whereupon he appealed to this court.

*Marshall K. Snell*, for appellant.

*W. C. Jones*, Attorney-General, and *Chas. H. Ayer*, Prosecuting Attorney, for The State.

The opinion of the court was delivered by

DUNBAR, J.—The record in this case shows that on the 22d day of July, 1890, the state's attorney, W. A. Reynolds, filed a complaint with John G. Sparks, a justice of the peace for Thurston county, State of Washington, charging appellant with the crime of seduction; whereupon appellant, being brought before the court, waived examination, and entered into a recognizance for his appearance at the superior court; that thereafter, on the 6th day of October, 1890, the said W. A. Reynolds, prosecuting attorney for Thurston county, made and filed with the superior court of Thurston county, State of Washington, an information charging appellant with having on the 10th day of

January, 1889, in the county of Thurston, Washington, seduced one Elsie Patnude, etc.; that thereafter, and on October 7, 1890, appellant was arraigned and required to plead to said information, and did plead not guilty thereto; that thereafter a trial was had, in which, on October 10, 1890, a verdict was rendered purporting to find appellant guilty of the crime of seduction; and thereafter a motion in arrest of judgment and a motion for a new trial were made, and denied by the court, and on October 24, 1890, a judgment and sentence were rendered by said court, purporting to adjudge appellant guilty of the crime of seduction, and that he be punished therefor by imprisonment in the state penitentiary at Walla Walla, in said state, at hard labor, for the period of four years, and that he pay the costs of prosecution, and committing him to the custody of the sheriff of Thurston county to carry such judgment into execution—all of which proceedings upon such trial, and up to and including the entry of judgment and sentence, are fully stated and made a part of the record of said superior court in such proceeding by its statement of facts, evidence and charge of the court as filed in this court; that at the time of entry of said judgment notice of appeal was given in open court, and a *supersedeas* granted by the court; that thereafter, and on the 13th day of March, appellant served notice of appeal, appealing from said judgment and sentence, and each and every part thereof, which notice of appeal is duly entered of record and filed in this court. The following grounds are relied upon by appellant for the reversal of this judgment: (1) Illegality of proceedings by information for a crime committed prior to the adoption of the constitution of the state; (2) misconduct of the jury; (3) insufficiency of evidence; (4) error of trial court.

As to the first proposition it is urged — (1) That the proceeding by information was illegal; (2) that an indictment



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was necessary to jurisdiction and a valid judgment; (3) that the court will look into the record to ascertain whether there was jurisdiction. During our territorial existence there was no question but that the defendant would have had a right to a presentment by a grand jury, and this crime was alleged to have been committed before the adoption of the constitution and the admission of the state into the union. Section 25, art. 1 of the constitution of the State of Washington provides that "offenses heretofore required to be prosecuted by indictment may be prosecuted by information, or by indictment, as shall be prescribed by law." Section 26, art. 1 of the constitution says:

"No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order."

Some of the questions involved here are exceedingly interesting, and this court has at least undertaken to give them a painstaking examination, and the conclusion reached from that investigation is, that the law changing the mode of procedure from an indictment to an information does not contain any of the elements, or respond to any of the accepted definitions, of an *ex post facto* law; and that it is not in violation of any guaranty by the federal constitution. The dissenting opinion of Justice HARLAN in *Hurtado v. People*, 110 U. S. 516 (4 Sup. Ct. Rep. 111, 292), cited by appellant, is a learned and highly interesting dissertation on the origin, history and benefits of a grand jury; but the reasoning of the learned judge does not appeal to our minds as strongly as does that of the majority opinion, which holds, upon well sustained reasoning, and by an overwhelming weight of authority, that a conviction upon an information for murder in the first degree, and a sentence of death thereon, are not illegal by virtue of the clause in the fourteenth amendment to the constitution of the United States, which prohibits the states from depriving any person of life or property without due process of

law. The application of the fifth amendment to the constitution of the United States to this question has been so distinctly settled that it seems to us that an extended discussion would not be justified. In *Barron v. Mayor and City Council of Baltimore*, 7 Pet. 243, Chief Justice MARSHALL, in discussing the fifth and sixth amendments, after a thorough review of the question, says:

“These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”

And in *Twitchell v. Com.*, 7 Wall. 324, the chief justice of the supreme court of the United States, in an opinion concurred in by the full bench, says: “But the scope and application of these amendments are no longer subjects of discussion;” and, quoting the opinion of Chief Justice MARSHALL, just above cited, says: “And this judgment has since been frequently reiterated, and always without dissent.” From an investigation of all the cases cited we are compelled to conclude that an indictment by a grand jury is neither a constitutional right, nor a substantial right of any kind, but that it is simply a procedure, and as such it is within the power of the legislature to change or abolish it. No right of defense is taken from the defendant in this action that he had at the time of the commission of the crime. He is entitled now, as he was then, to be tried by a jury of his peers; to be heard by himself or counsel; to meet the witnesses face to face; to have the same length of time to prepare for trial. It takes the same weight of testimony now as it did then to convict. He is entitled to the same presumptions. The penalty for the crime remains the same. No right has been abridged, no avenue of escape closed up, which was open to him before. It was not in the grand jury room that he could make any defense before. That room presented to him a closed door. The presentation through the grand jury is

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simply a mode of procedure by which the defendant is brought formally before the trial court. The state can prescribe another mode, as it has, by information filed by the prosecuting attorney. These are questions that cannot substantially concern the defendant. They are preliminary proceedings—mere modes of attainment or forms of procedure. There is no fundamental right of the defendant affected by one of these modes any more than by the other. No one has any vested interest in either of these modes of procedure. Through the instrumentality of either, the defendant is charged with crime, and put upon his defense; and, if these preliminary steps have been taken according to law, and he has had a fair trial in a court of justice according to the modes of proceeding applicable to such a case, he cannot be heard to complain.

As to the question whether or not the law now in force in relation to informations as applied to this crime is an *ex post facto* law, we will quote and abide by the classified definition of Justice CHASE in *Calder v. Bull*, 3 Dall. 386, quoted afterwards by the supreme court of the United States with approval, and which has been generally accepted by the courts as a comprehensive and correct definition, which is as follows:

“(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime, or makes it greater than it was when committed; (3) every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender.”

Measured by this standard, the law in question cannot be said to be *ex post facto* in its effect. If so, under what classification does it fall? We cannot agree with the ap-

pellant that either anything decided or any *dictum* in the case of *Kring v. State*, 107 U. S. 221 (2 Sup. Ct. Rep. 443), supports his contention in this case. What was held in that case was that “within the meaning of the constitution any law is *ex post facto* which is enacted after the offense was committed, and which, in relation to it or its consequences, alters the situation of accused to his disadvantage.” Kring had been indicted for murder in the first degree. He had been tried four times, and convicted once on a plea of guilty of murder in the second degree, and was sentenced to imprisonment in the penitentiary for twenty-five years. He took an appeal from the judgment on the ground that he had had an understanding with the prosecuting attorney that if he would plead as he did his sentence should not exceed ten years’ imprisonment. The judgment was reversed by the supreme court, and when the case came on for trial again he refused to withdraw his plea of murder in the second degree, and refused to renew his plea of not guilty, which had been withdrawn when he pleaded murder in the second degree. The court then, against his remonstrance, made an order setting aside his plea of guilty of murder in the second degree, and directing a general plea of not guilty to be entered. On this plea he was tried, found guilty, and sentenced to death, and the judgment was affirmed by the supreme court of the State of Missouri. It was conceded in that case that, at the time of the commission of the crime, in the State of Missouri, under the law, the acceptance by the prosecuting attorney and the court of the plea of murder in the second degree to an indictment of murder in the first degree, and the conviction and sentence of the defendant under it of murder in the second degree, was an acquittal of the charge of murder in the first degree, and that he could not be tried again for that offense; but the state court overruled this defense on the ground that by

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§ 23 of article 2 of the constitution of Missouri, which took effect after the commission of the crime by Kring, the former law was abrogated, and that he could be tried for murder in the first degree notwithstanding his conviction and sentence for murder in the second degree; and the supreme court of the United States by a divided court held that the article in the new constitution was an *ex post facto* law. But in that case a perfect defense to the crime of murder in the first degree which existed at the time of the commission of the crime was taken away by the new law; a defense, at least, which the defendant could avail himself of by the consent of the court, and a defense which he had availed himself of by such consent at his former trial. And well the court said:

“Whatever may be the essential nature of the change, it is one which, to the defendant, involves the difference between life and death.”

And again says the court:

“The question here is, does it deprive the defendant of any right of defense which the law gave him when the act was committed, so that as to that offense it is *ex post facto*?” “In that case,” said the court, “the constitution of Missouri so changes the rule of evidence that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely, a judicial conviction for a lower grade of homicide, is not received as evidence at all, or, if received, is given no weight in behalf of the offender. It also changes the punishment, for, whereas the law as it stood when the homicide was committed was, that when convicted of murder in the second degree he could never be tried or punished by death for murder in the first degree, the new law enacts that he may be so punished, notwithstanding the former conviction.”

But it is certainly difficult to see the application of this reasoning to the case at bar. It is true, as urged by appellant, that § 1000 of the Code of Washington provides that “when an indictment indorsed ‘not a true bill’ has been

presented in court and filed, the effect thereof is to dismiss the charge, and the same cannot be submitted to or inquired of by the grand jury unless the court so orders." But this section is evidently not intended to confer any right upon the defendant, but simply to expedite the business of the court, subject to the direction of the court. In order to make it avail the defendant, it must be presumed—(1) that the grand jury would have returned "not a true bill;" and, (2) that after they had done so, the court would not have allowed the charge to be submitted to another grand jury. Such presumptions can hardly be indulged in favor of defendants who seek to escape from a trial upon the merits. No one can or should question the right of the defendant to be tried by the law in force when the crime was committed. This is a principle that is founded in natural justice, that is warranted by the wisdom of ages, and guaranteed by our constitution; but, while the defendant must be protected in every substantial right, the rule must not be so narrowly construed as to defeat the ends of justice, or hamper or retard progress by preventing the enactment of laws governing questions of procedure which experience teaches us should be enacted; but the limitation must be construed as affecting the rights of parties, as distinguished from such as merely change the remedies by which those rights are to be enforced. In this case we cannot see that the condition of the defendant is changed for the worse. The law complained of makes no new offense. It gives no new definition to the crime he is charged with. It does not increase the punishment for the commission of the crime. It does not change the rules of evidence to make conviction more easy. None of his rights are interfered with. Upon his arraignment he stands in exactly the same position with reference to his trial, and the probabilities of his acquittal or conviction, that he did when the old law was in force. The state has simply

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changed its procedure. Of this he cannot be heard to complain, for, as is said by Mr. Cooley in his *Constitutional Limitations*, page 329:

“So far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose.”

So far as the retroactive or retrospective quality of the law is concerned, it is not retroactive in any sense that can injure the defendant, or in any constitutional sense. In all retroactive laws there must be an element of surprise, by which the persons whose rights are affected are taken unawares, and are called upon to act in a manner different from what they had been led by the previous state of the law to anticipate. Wade, *Retroactive Laws*, § 34. It is unnecessary to repeat that the defendant's case does not fall within the scope of this definition. The only limit imposed upon the legislative power of the states in reference to the passage of retroactive laws by the constitution of the United States is, that such laws shall not be *ex post facto*, and shall not impair the obligations of a contract. *Railroad Co. v. Nesbit*, 10 How. 395, and cases cited; *Watson v. Mercer*, 8 Pet. 88, and cases cited.

The second contention is that the judgment must be reversed on the ground of misconduct of the jury in separating and each going his own way without the custody of the court at various times during the trial, and in returning a sealed verdict. On this point the record shows that the jury separated, but is silent as to whether such separation was by consent of the parties. A strong and somewhat exhaustive argument was made by appellant's attorney

upon this point, urging that, in the absence of an affirmative showing of consent, no presumption of consent would attach; while, on the other hand, it was claimed by the attorney-general that, inasmuch as the statute allows the jury to separate with the consent of the parties, and the record shows that the court allowed them to separate, the presumption therefore is that the parties did consent. But it is not necessary for us to discuss this proposition. Section 278 of the Code of Washington provides the manner in which the question of misconduct of the jury shall be raised on motion for new trial, which is by affidavit. As this ground for new trial was not shown in the manner provided by the statute, it will not be considered by this court.

As to the sufficiency of the evidence, we think we would not be justified in interfering with the prerogative of the jury in this case to pass upon the weight of testimony. Competent testimony was introduced tending to show the commission of the crime charged by the defendant. The jury heard the testimony, saw the witnesses on the stand, noted their manner of testifying, listened to the testimony concerning the age and experience of the defendant and the tender age and want of experience of the female; the fact that she was under his own roof, and to a certain extent under his protection; that she was just merging into womanhood, and that she was at that critical age when judgment is weak and passion is strong, and when virtue falls an easy prey to the blandishments of the designing libertine—artifices and blandishments which, exercised upon a woman of more mature years, would fall harmless. All these things the jury had a right to take into consideration. They probably did take them into consideration, and, considering all the circumstances of the case, under the instructions of the court, they adjudged him guilty, and he must abide by their decision. Our statute of seduction has no reference



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July, 1891.]      Dissenting Opinion — ANDERS, C. J.

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to the age. All the qualification is that the woman shall be unmarried and of previously chaste character.

We find no substantial error in the instructions of the court or the admission of testimony, and the judgment of the lower court is affirmed.

STILES and HOYT, JJ., concur.

ANDERS, C. J. (*dissenting*). — It appears from the certified statement of facts in this case that the jury were told by the court, after the testimony was closed and the cause was finally submitted to them, that they might, in case they agreed upon a verdict during the night, seal the same, and deliver it to their foreman and bring it into court on the following morning, which the jury accordingly did. The record fails to show that the defendant consented to this proceeding, and I am of the opinion that without his consent, which should affirmatively appear of record, the jury should not have been permitted thus to separate. The contrary was the practice at common law, and the only change made by our statute is that permitting the jury to separate by consent of the defendant and the prosecuting attorney during the trial. See Code, § 1089. Section 1102 of the Code provides that “when the jury have agreed upon their verdict they must be conducted into court by the officer having them in charge. Their names must then be called, and, if all appear, their verdict must be rendered in open court; and, if all do not appear, the rest must be discharged without giving a verdict, and the cause must be tried again at the same or next term.” This language, it seems to me, clearly implies that the jury must be kept in charge by the officer, and not be permitted to go at large until after the rendition of their verdict in open court. See Proffatt, Jury Trial, § 451.

Upon the other questions involved in the case I concur in the opinion delivered by Mr. Justice DUNBAR.

SCOTT, J., concurs.

Statement of the Case.

[2 Wash.]

## ON PETITION FOR REHEARING.

DUNBAR, J.—The petition for rehearing in this case is founded on the alleged imperfection of the transcript sent up to this court from the superior court, and the petition is to rehear on an amended record. The case was tried on the record brought here by the appellant. Had he suggested a diminution of the record when the case was before this court it would have ordered the record supplied; but public policy will not allow cases to be tried by piecemeal. It cannot allow an appellant to rest his case on certain points of the record, and if he fail, to try his case on another and different record.

ANDERS, C. J., STILES, HOYT, and SCOTT, JJ., concur.

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[No. 170. Decided July 15, 1891.]

J. C. RATHBUN V. THURSTON COUNTY.

## APPEALS — RECORD — PRESUMPTIONS.

Where the evidence in a cause is not made a part of the record on appeal, it will be presumed that the findings of fact by the court below were warranted by the evidence.

*Appeal from Superior Court, Thurston County.*

Action by J. C. Rathbun against Thurston county on a contract for publishing a delinquent tax list. Judgment for plaintiff for part of his claim, from which judgment he appeals.

*J. C. Rathbun*, for appellant.

*Chas. H. Ayer*, County Attorney, and *W. J. Milroy*, for appellee.

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July, 1891.] Opinion of the Court — ANDERS, C. J.

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The opinion of the court was delivered by

ANDERS, C. J.—This action was tried in the court below upon a written stipulation of facts, from which it appears that appellant, who was the publisher of a newspaper, advertised the delinquent tax list of the county for the year 1889, for an agreed compensation of 75 cents for each separate description of real estate for the first insertion, and 25 cents for each subsequent insertion. It is conceded that the advertising was done in accordance with law and the agreement of the parties; but, on settlement with the county commissioners for the work done, a controversy arose over the meaning of the expression “each separate description of real estate.” The plaintiff contended that a separate description of real estate is a description of an individual lot, tract or parcel of land appearing upon the assessment roll, without respect to the number of such individual lots, tracts or parcels that may have been assessed to a single owner, notwithstanding the tax levied upon all such parcels may have been carried out in total, and placed opposite the last item in the list. On the contrary, the commissioners claimed that such separate description embraces all the lots, tracts and parcels of land assessed to a single owner, where the valuation thereof is carried out in total, and the tax levied against the whole is placed opposite the last item in the list instead of a separate assessment and valuation being made for each such lot, tract or parcel of land. According to the contention of plaintiff he is entitled to be paid the contract price for publishing 564 separate descriptions, but according to the view of defendant he is only entitled to compensation for advertising 270 of such descriptions, and for which the county paid him.

The court below found as facts that the delinquent tax list published by plaintiff contained 330 separate descriptions, and that there was still due the plaintiff from defend-

ant the sum of \$90, for which sum judgment was duly rendered for plaintiff. The latter brings the case here, and asks this court to define the abstract meaning of the words "separate description of real estate." These words are of such obvious import that we doubt if any definition we might undertake to give would render their meaning more clear than that suggested by the words themselves. It would seem evident that a separate description of a tract of land is such a description as will sufficiently identify it for the purpose for which the description is required. A description in a deed might or might not be sufficient in an assessment for the purpose of taxation. But, so far as this case is concerned, we have nothing before us whereby we can ascertain how the lands were described in the delinquent tax list as published by appellant, and are therefore unable to determine whether the court below adopted the theory of the plaintiff or that of the defendant. The delinquent list, as published, not having been made a part of the record here, we must conclude that the findings of fact of the court below were warranted by the evidence, and that the judgment therein rendered is correct.

The judgment of the lower court is therefore affirmed.

SCOTT, STILES, DUNBAR, and HOYT, JJ., concur.

[No. 259. Decided July 17, 1891.]

A. F. MILLS v. THE STATE OF WASHINGTON, *on the Relation of J. R. Smith, Mayor.*

QUO WARRANTO—INTEREST OF RELATOR—MUNICIPAL CORPORATIONS—POWERS OF MAYOR PRO TEM.

Under the statutes of this state (Code 1881, § 702, *et seq.*), relating to information in *quo warranto* proceedings, the mayor of a city has no interest in the office of city councilman sufficient to entitle him to appear as relator in such proceedings to oust an alleged usurper of that office.

2 566  
422 198

2 566  
28 492  
28 493  
28 502

2 566  
42 411

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July, 1891.]Statement of the Case.

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Under the act of March 9, 1891, providing that the number of councilmen in cities of the third class shall be increased from six to seven, and authorizing the mayor or mayor *pro tem.*, on or before June 15, 1891, with the consent and approval of the council to appoint the additional member, a mayor *pro tem.*, duly elected and lawfully acting, has authority to make such appointment, although such appointment may be long prior to the time limited by law, and the mayor may be within the corporate limits of the city at the time.

*Appeal from Superior Court, Clarke County.*

*Quo warranto* on the relation of J. R. Smith, mayor of the city of Vancouver, Washington, in his official capacity, to oust from the office of city councilman of the city of Vancouver the appellant, A. F. Mills. Vancouver is a city of the third class, organized under Laws 1889-90, p. 131. By the amendatory act of March 9, 1891, the number of councilmen for such city was enlarged from six to seven, and the act provided that "the mayor or mayor *pro tem.* shall, on or before the 15th day of June, 1891, with the consent and approval of the city council, appoint an additional member as provided for by this section." On the 30th day of March, 1891, prior to the adjourned meeting of the city council to be held on that day, the mayor, J. R. Smith, filed with the clerk of the council the nomination of W. H. Brewster as councilman at large. The council met the same day, in pursuance of a former resolution of adjournment from the regular meeting on the 16th of March, 1891, and the mayor of the city being absent, they proceeded regularly to elect one of their members, L. M. Hidden, as mayor *pro tem.*, and after considering the nomination of W. H. Brewster, made by the relator, rejected the same. The mayor *pro tem.* then presiding, was requested to fill the vacancy in the office of seventh or additional councilman, and the mayor *pro tem.* thereupon nominated the appellant, A. F. Mills, who was thereupon elected by a vote of four to two, the mayor *pro tem.* voting in favor of his appointment. On

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Opinion of the Court—DUNBAR, J.

[2 Wash.]

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the next day A. F. Mills duly qualified as councilman. During the whole of this meeting the mayor was absent from the place of meeting, but was present within the corporate limits of the city. Demurrer to the complaint was overruled; and an answer and agreed stipulation of facts having been filed, the court rendered judgment upon the pleadings and stipulation in favor of relator. From the decision on the demurrer and from this judgment defendant appeals.

*W. Byron Daniels, and Williams & Wood (S. B. Linthicum with them on the brief), for appellant.*

*Wiswall & McCredie, for appellee.*

The opinion of the court was delivered by

DUNBAR, J.—This case presents to our consideration two questions: *First*, Does the complaint show that the respondent has sufficient interest in the office claimed to have been usurped, to entitle him to appear as relator in an information in *quo warranto* proceedings? *Second*, Did the mayor *pro tem.*, by and with the consent of the city council, have the power to appoint the additional councilman? The law involved in these propositions was presented so ably and concisely by counsel on the respective sides that the court has been greatly aided in its investigations. It seems hardly necessary, for the purpose of this investigation, to consider the history of the writ, or of the information in the nature of *quo warranto*, further back than the statute of Anne (9 Anne, c. 22), when the proceeding by information, which had before been a criminal proceeding, became the means of determining civil rights between private parties, and the rights which could before be investigated only through the interposition of the writ of *quo warranto*. Under that statute any one could prosecute the usurper of an office simply by leave of the court. The

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July, 1891.] Opinion of the Court—DUNBAR, J.

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practice then soon obtained to allow informations almost as a matter of course. "Indeed," says Mr. High, in his *Extraordinary Legal Remedies*, § 605, "to such an extent had the granting of these informations been carried that it was often deemed prudent not to show cause against the rule *nisi*, lest the respondent should thereby disclose his grounds of defense." It finally became noticeable that the remedy was abused, and used for the gratification of personal malice, and the courts again began to exercise their rights under the statute of Anne, and would not allow the information to be filed unless it appeared that the relator had some interest in the matter. The discretion of the court had to be appealed to in each instance. So far there can be no difference of opinion, but from this on there are some distinctions claimed by both parties. For instance, it is claimed by the appellee that there is a distinction in the necessary interest of the relator where the action is brought to disenfranchise the corporation, or take its life, and where it merely goes to the administration of corporate functions; and authorities are cited which seem to establish this distinction. No doubt, in reason, a greater interest in the relator should be required where the life of a corporation is at stake, and where the public would suffer by its destruction, than where a simple functional power is called in question; though it may be said in this connection that our statute does not recognize this distinction. See § 702, subd. 1, Code. On the other hand, it is contended that while, under the statute of Anne and of kindred statutes, where the discretion of the court is to be exercised, the private individual or tax-payer may file the information, yet in statutes similar to ours, where courts are divested of this discretion, that the rule is changed, and the information must be filed by the state's officer, or, if filed by the private individual, that he must show some special interest in the subject of the controversy; and that the cases

cited by appellee, all being cases either under the common-law rule or in compliance with the requirements of the statute of Anne, are not in point. After a careful consideration of the authorities and cases cited, we are inclined to adopt this view.

In *Murphy v. Farmers' Bank*, 20 Pa. St. 415, the court in rendering the opinion says the substance of the statute of Anne had been adopted before the Revolution as a part of the common law, and was a part of the law in Pennsylvania, and that the practice of the court was not affected by the statute of 1836. Mr. High had special reference to the statute of Anne, and to the discretion of the court, in § 681, cited by appellee, where he says:

“The statute of Anne extended the remedy by *quo warranto* information, which had before been considered much in the nature of a prerogative one, to private citizens desiring to test the title of persons usurping or executing municipal offices and franchises, and rendered any person a competent relator in such proceedings who might first obtain leave of the court to file an information.”

*State ex rel. Mitchell v. Tolan*, 33 N. J. Law, 195, was tried under a statute giving discretion to the court to allow or reject the filing of the information. The judgment in *State ex rel. Richards v. Hammer*, 42 N. J. Law, 435, was based upon the same ground; and the court, in discussing this question, says:

“All that the court requires in such instance is to be satisfied that the relator is of sufficient responsibility,” etc.

In *Churchill v. Walker*, 68 Ga. 681, leave of the court had first to be obtained. In *Com. ex rel. Yard v. Meeser*, 44 Pa. St. 341, the statute was the same, and even with that statute the court reluctantly sustained the case by reason of some special act; for after expressing its reluctance, the court says:

“We observe that by the act of 24th April, 1854, § 3 (not cited to us in arguing these disputes, and not before



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July, 1891.]      Opinion of the Court—DUNBAR, J.

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noticed by us), any tax-payer may obtain an injunction against any violation of the charter law of the city, and we may take this as a fair analogy for granting this writ."

And then the court adds, "especially as we can always prevent the abuse of it by the exercise of discretion," etc. Thus it will be seen that the practice of allowing private individuals, who are not specially interested, to interfere with the public officers of the state is bottomed on the idea of the discretion of the court, and that the court can restrain any abuse that might otherwise flow from allowing irresponsible parties to make the state a party to their petty troubles and personal likes and dislikes. And the appellee seems imbued with this idea, for he says in his brief:

"It is important that we bear in mind that any evils that might arise from permitting the writ to issue at the instance of a private relator are properly and sufficiently guarded, since it can issue only in the sound discretion of the court."

But we look in vain for any discretion given to the court by our statute. The common law on that subject has been supplanted by the statute—the state has legislated on the subject—and it is to the statute we must look, not only for the practice of the court, but for the qualifications of the relator. Section 702 provides that "an information may be filed against any person or corporation in the following cases" (subsequent subdivisions reciting the cases). Section 706 provides that "whenever an information is filed, a notice signed by the relator shall be served and returned as in other actions. The defendant shall appear and answer, or suffer default, and subsequent proceeding be had as in other cases." There is no discretion given to the court, and, if discretion should be given to the court, the discretion should not go beyond the statutes. The statutes specify those who have the legal right to invoke

this remedy. If the relator has a standing here, it must be under § 703, which is as follows:

“SEC. 703. The information may be filed by the prosecuting attorney in the district court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority, or by any other person, on his own relation, whenever he claims an interest in the office, franchise or corporation which is the subject of the information.”

The legislature has looked out for the interests of the public by providing that the information shall be filed by the prosecuting attorney, either on his own relation, or when directed by the court or other competent authority; and private interests are provided for in the latter part of the section by the words, “or by any other person on his own relation.” When? When he “claims an interest in the office, franchise or corporation which is the subject of the information.” What interest is meant? Surely not an interest in common with other citizens, for the protection of that interest is already provided for in the first part of the section. If the statute is to be construed as having any meaning at all, and if words are to be given their ordinary meaning, and the ordinary grammatical construction is given to the language and sentences, it must mean that the interest must be a special interest, not common with the interests of the community. Section 705 confirms this view:

“SEC. 705. Whenever an information shall be filed against a person for usurping an office, by the prosecuting attorney, he shall also set forth therein the name of the person rightfully entitled to the office, with an averment of his right thereto; and when filed by any other person he shall show his interest in the matter, and he may claim the damages he has sustained.”

Thus it will be seen that when the information is filed by the prosecuting attorney in the interests of the public,

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those interests need not be shown, but when filed by any other person he shall show his interest in the matter, and he may claim the damages he has sustained. What possible damages could the mayor be entitled to in this case? Or what damages could any one be entitled to who had no interest separate from the common interest of the public?

The following sections: "Sec. 707. In every case wherein the right to an office is contested, judgment shall be rendered upon the rights of the parties, and for the damages the relator may show himself entitled to, if any, at the time of the judgment. Sec. 708. If judgment be rendered in favor of the relator, he shall proceed to exercise the functions of the office, after he has been qualified as required by law, and the court shall order the defendant to deliver over all books and papers in his custody, or within his power, belonging to the office from which he has been ousted. Sec. 710. When judgment is rendered in favor of the plaintiff, he may, if he has not claimed his damages in the information, have his action for the damages at any time within one year after the judgment,"—all convey the idea that where the relator is other than the prosecuting attorney he must show his interest, and will be entitled to damage if he prevail, showing conclusively that his interest must be a special interest, and that his damage would be equally distinct. It is not alleged in the complaint that the relator is even a tax-payer, so that the cases cited on that question are not in point, even if the law of this state should be construed to permit a tax-payer to become a relator in such case. He appears simply claiming the interest of a mayor. It is difficult to see what interest the mayor has in the office of a city councilman that any other citizen has not. He is interested in the rightful administration of the laws, but so is every other citizen. If he be a tax-payer he is interested in an economical administration, but so is every other tax-payer in the

city. It may be fairly presumed that he is an influential citizen, and commands the esteem and confidence of his fellow-townsmen, but this does not give him any additional legal interest in the city government. So far as the remarks of Judge Dillon (1 Dill. Mun. Corp., 4th ed., § 13, cited by the court below in its very able opinion) are concerned, they might be profitably considered by a legislative body, but certainly can be of little assistance to a court in construing a statute. Judge Dillon was indulging in a statement of what he thought the law should be; the province of the court is narrower—it is to ascertain what the law is. Inasmuch as the statute seems to tolerate but one construction, it appears hardly worth while to specially review the authorities cited by appellant. We have examined them, and they bear out his contention. It is true that in *Miller v. Town of Palermo*, 12 Kan. 14, as cited in appellant's brief, the relator sought to have the corporation dissolved; but the judgment of the court seemed to be based on the general proposition that, if the injury is one that particularly affects a person, he has a right to the action; if it affects the whole community alike, their remedy is by proceedings by the state through its appointed agencies. It is contended by the appellee that, under our system of government, where the people have so prominent a part in the filling of offices, to prevent an interested citizen from applying for a writ of inquiry, excepting by the consent and in the name of the prosecuting attorney, is going far towards the practice of governments where kings and kingly officers do the governing. But the very fact that under our system of government the people have so prominent a part in the filling of the offices, is an answer to the objection, as it places in their hands a remedy for any abuse that might grow up under the system. The ancient writ of *quo warranto* was exclusively in the interest of the king, and the subject had no right to invoke it at all. Its

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office was to inquire into the usurpation of, and to protect, the prerogatives of the crown; but he who draws a parallel between the use of a legal remedy exercised by the ancient kings for the benefit of the crown, and a remedy exercised by public officers under our system of government for the benefit of the public, fails to discriminate between a monarchical and republican form of government. Ours is purely a representative government; the government is the people, and the prerogative of the government is a prerogative of the people; and the public prosecutor represents and acts for the people, and is responsible to the people alone for his office. The representatives of the people, in exercising their legislative discretion, have not deemed it proper, or to the best interest of society, that grievances of a public character, affecting the whole community alike, should be investigated at the suit of a private individual, but through the agency of a public officer, who represents and has in charge the interest of the whole community. This principle is not confined to this particular remedy, but is applicable to the law governing the enforcement of other rights. Whether the legislation be right or wrong, the statute on the subject of information will bear no other construction or interpretation than that embodied in this general statement, that if the injury is one that is peculiar to the individual he has his right of action, but if it affects the whole community alike, the remedy is by proceedings by the state through its appointed agencies.

As to the second proposition, it seems to us there can be but little controversy. The appointing power is given by the proviso to § 4 of the amendatory act of 1891, and is as follows:

*“Provided, That the mayor or mayor pro tem. shall, on or before the 15th day of June, 1891, with the consent and approval of the city council, appoint the additional member,”* etc.

There is no greater power conferred by this section on

the mayor than there is on the mayor *pro tem.*; either one could, with the consent of the council, make this appointment any time before the 15th day of June, 1891. The only question is, was Hidden properly acting as mayor *pro tem.* at the time the appointment was made? If he was, the power to appoint was conferred upon him by the statute, and it is not questioned that he was at such time a lawfully acting mayor *pro tem.* It is made the duty of the mayor to preside at all meetings of the council; and the law provides that in case of his absence the council may appoint a mayor *pro tem.* It matters not what the cause of the mayor's absence was, or whether he was in the city or out of it; he was absent from the meeting of the council, and this was the only fact the ascertainment of which was necessary by the council to authorize the appointment of a mayor *pro tem.* The demurrer to the information should have been sustained.

It follows that the judgment is reversed, and the case remanded to the lower court with instructions to proceed in accordance with this opinion.

ANDERS, C. J., and STILES, HOYT, and SCOTT, JJ., concur.

[No. 286. Decided July 17, 1891.]

A. J. BAKER, FRED E. SANDER AND JAS. A. MOORE V.  
THE CITY OF SEATTLE, HARRY WHITE, as Mayor of  
said City, H. W. MILLER, as Clerk of said City, C.  
W. FERRIS, as Comptroller of said City, AND N. W.  
HARRIS & Co.

MUNICIPAL CORPORATIONS—ISSUANCE OF BONDS—INDEBTEDNESS  
—ASSENT BY VOTE—CONSTITUTIONAL LAW—CONSTRUCTION OF  
STATUTES—ELECTIONS.

Where street improvement warrants, under powers conferred by a city charter, are payable from funds derived by creating local assessment districts within which a special levy could be laid upon the property to pay for the entire expense of street improvements,

2	576
8	673
9	576
6	255
27*	462
33*	429
2	576
12	371
12	527
13	705
2	576
15	412
16	215
17	317
17	341
17	362
2	576
25	212
25	818

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Syllabus.

and the agreement with the contractors for work upon such improvements was that they should be paid "out of a special fund," the indebtedness created is not within the meaning of the constitutional limitation on municipal debt.

Where, under a charter power to widen streets and to condemn such real estate as may be necessary therefor, a city has taken possession of condemned lands, without collecting benefits assessed therefor, or making payment of damages awarded thereon, the neglect of the city does not make such condemnation awards a part of the general municipal indebtedness.

The act of February 26, 1890 (Laws 1889-90, p. 225), empowering cities and towns organized prior to the adoption of the state constitution to extend their credit and fund their indebtedness, and validating certain indebtedness already created, is not unconstitutional by reason of embracing more than one subject.

The application of the act of February 26, 1890, to cities and towns existing at the time of the adoption of the constitution is not in violation of article 11, § 10 of that instrument, requiring the incorporation, organization and classification of cities in proportion to population, as at the same session of the legislature in compliance with this requirement, the same authority was conferred upon municipal corporations to be thereafter organized; and the legislation of the session on this subject, though not all contained in one act, was uniform and universal in its operation.

Section 5 of the act of February 26, 1890, validating the existing indebtedness of any city or town, contracted for strictly municipal purposes, where the same exceeds the amount authorized by the charter of such city or town, and providing further that if the excess reach beyond one and one-half per cent. of the taxable property, three-fifths of the voters of the town must assent thereto, is not a void exercise of legislative power, as it falls within the principle that where a municipal corporation has done an act beyond its statutory powers, but within the powers which it was competent for the legislature to have conferred upon it, the act may be validated by a curative statute.

The act of March 7, 1891, providing for an election for the validation of warrants issued in excess of the one and one-half per cent. limit by any city or town having a corporate existence in the state is not unconstitutional on the ground of special legislation, but is a curative act, applicable only to what had been done before the date of its passage.

As the language of the constitutional provision permitting cities to incur an indebtedness up to five per cent. of their taxable property, when authorized by the legislature, is not certain to the

effect that the legislature must provide that the three-fifths vote of the citizens therefor shall be an antecedent one, the act of March 7, 1891, authorizing elections to ratify existing municipal indebtedness in excess of the one and one-half per cent. limit, is not unconstitutional.

An election to ratify municipal indebtedness in excess of the one and one-half per cent. limit, and an election to authorize the issuance of bonds to fund the debt thus ratified, together with other debt, under separate ordinances providing for the submission of both propositions to vote on the same day, can lawfully be held at the same time and places, and but one notice of election embracing the two ordinances is required.

The city of Seattle having contracted for a sale of its bonds at an agreed price in advance of the authorization of their issue by popular vote, and of the validation of the indebtedness to be funded by the bonds, it was proper, under the charter of said city, to submit the proposition of sale to vote at such election.

A proposition to issue \$460,000 worth of bonds, or such lesser sum as may be sufficient, is not objectionable on the ground of indefiniteness, when the only authority to be given the city officers is to issue bonds to an amount sufficient to take up \$370,979.44 worth of warrants with legal interest thereon.

It is not necessary that the proposed bonds be of the kind prescribed by the act of March 26, 1890 (Laws 1889-90, p. 520), as the provisions of that act apply specially to bonds issued to raise money for water, sewer or light plants.

*Appeal from Superior Court, King County.*

The facts are fully stated in the opinion.

*A. Battle*, for appellant.

*Orange Jacobs*, and *Burke, Shepard & Woods*, for appellees.

The opinion of the court was delivered by

STILES, J.—On the 1st day of June, 1891, an election was held in the city of Seattle, under the act of March 7, 1891, p. 267, entitled “An act to enable cities and towns to validate certain warrants and other obligations and evidences of indebtedness on the part of such cities and towns, issued by the corporate authorities thereof in excess of their legal



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authority, and declaring an emergency to exist.” The propositions submitted at that election were to validate indebtedness as follows: Class 1 — Warrants drawn payable out of the road fund of said city, and dated and issued on sundry days between September 21, 1889, and November 17, 1889, both inclusive, numbered from 3629 to 4029 of the year 1889, both inclusive, the face amounts whereof aggregate the sum of \$33,279.92. Class 2 — Warrants drawn payable out of the road fund of said city, and dated and issued on sundry days between November 18, 1889, and February 25, 1890, both inclusive, numbered from 4030 to 4380 of the year 1889, and from 1 to 620 of the year 1890, both inclusive, the face amounts whereof aggregate the sum of \$91,567.73. Class 3 — Warrants drawn payable out of the road fund of said city, and dated and issued on sundry days between February 26, 1890, and August 2, 1890, both inclusive, numbered from 621 to 2786 of the year 1890, both inclusive, and the face amounts whereof aggregate the sum of \$188,350.20. Class 4 — Warrants drawn payable out of the fire fund of the said city, and dated and issued on sundry days between May 3, 1890, and August 16, 1890, both inclusive, numbered from 331 to 598, both inclusive, the face amounts whereof aggregate the sum of \$57,781.59. The vote in favor of the validation was very largely in excess of the three-fifths majority required by the act, and the indebtedness covered by it stands validated unless there are constitutional reasons against it.

At the same election there was also submitted the proposition to fund this indebtedness when validated, by the issuance of bonds in pursuance of the act of March 7, 1891, p. 269, entitled “An act authorizing cities and towns to submit to the voters therein propositions to fund indebtedness of such cities and towns by the issuing of bonds therefor, at the same election at which the previous attempted incurring of such indebtedness, or any part thereof, may

be ratified." This latter proposition was also carried by an equally large vote, and the city of Seattle is preparing to issue bonds; and to prevent their issue appellants brought their action to restrain the municipal authorities from proceeding therein. Paragraph 11 of their complaint states the principal grounds of their objection to the bonds, which are as follows:

"(1) That at the date of issue of all the warrants proposed to be validated, from warrant No. 4251, in class 2, dated December 7, 1889, for the sum of \$32.87, and payable out of the road fund of said city, its absolute indebtedness, excluding these warrants, was \$160,169, which was one per cent. of the taxable property of said city, according to the last previous assessment thereof, August 30, 1889, the assessment having been \$16,016,900. (2) That at the date of issue of all the warrants proposed to be validated, from warrant No. 1395 in class 3, dated May 3, 1890, for the sum of \$36.81, payable out of the road fund of said city, its absolute indebtedness, excluding these warrants, was \$240,253.50, which was one and one-half per cent. of the taxable property of said city according to the said assessment. (3) That there were outstanding, and not included in the above mentioned \$240,253.50, of absolute indebtedness, or in any of the warrants claimed to have been validated, on the 5th day of May, 1890, certain 'street improvement warrants' issued under and by virtue of § 8, ch. 3 of the charter of the city of Seattle, granted by the territorial legislature February 4, 1886, amounting in all to \$303,817, and which should be considered as part of the general indebtedness of said city. (4) That prior to May 5, 1890, the city of Seattle had, by virtue of the power conferred upon it by § 5 of chapter 2 of its said charter of 1886, condemned and taken certain lands in said city to widen and extend Front, Second, Commercial, South Second and South Third streets, and to establish a certain public square at the northwest corner of Front street and Yesler avenue; that, in the course of such condemnation and taking, awards of damages had been allowed against it in the total sum of \$247,000, which sum should be considered as a part of the general indebtedness

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of said city; for the reason that the said city has taken possession of said lands, but has paid no part of the said awards, and has collected less than one per cent. of the same from the property assessed to pay therefor. (5) That at the dates of the issuance of all the warrants in classes 3 and 4, issued after May 5, 1890—that is to say, beginning with warrant No. 333, for the sum of \$450, payable out of the fire fund of said city, and including said warrant, and all warrants dated and issued subsequently thereto, and included in classes 3 and 4—the absolute indebtedness of said city, if said street improvement warrants and said condemnation awards were a part thereof, exceeded five per cent. of the taxable property of said city, as appeared by the assessment of August 30, 1889, to wit, \$827,833. (6) That there has been no vote of said city to authorize its indebtedness to be increased beyond one and one-half per cent., other than the vote of June 1, 1891.”

The answer of the city admitted the facts stated in the complaint to be true, but alleged affirmatively:

“(1) That by § 5 of the act of February 26, 1890 (Acts 1890, p. 225), all of the indebtedness of the city of Seattle in excess of one per cent. of the assessment of 1889, and not in excess of one and one-half per cent. thereof, was validated and made legal indebtedness thereof. (2) That on February 26, 1890, the absolute indebtedness of the city of Seattle, including the indebtedness thus legalized, did not reach the limit of one and one-half per cent., nor was that limit reached until April 29, 1890, and after the issuance of warrant No. 1394, on the road fund, for the sum of \$1,575, included in class 3. (3) That by the terms of the said street improvement warrants, and under the law governing their issuance, they were not primarily a general liability of the city of Seattle, but were chargeable to and payable out of particular funds, to be derived from local assessments. (4) That the said condemnation awards were likewise not a primary or general liability of the city, but were chargeable and payable out of local assessments only.”

The plaintiff interposed a general demurrer to the answer, upon the argument of which the court sustained it as a demurrer to the complaint, and dismissed the action.

Before proceeding to pass upon the other features of this case we will speak of the two classes of alleged indebtedness which would absorb a very large portion of the city's debt creating power if they were to be counted as a part of its constitutional liabilities, viz., the street improvement warrants and the condemnation awards.

*First:* Under the charter of 1886 the city of Seattle had the power to make street improvements either with funds drawn directly from the treasury or by creating local assessment districts upon the property, within which a special levy could be laid to pay for the entire expense. These warrants were the result of proceedings of the latter class. They show upon their face that they are payable out of the "street improvement funds, under ordinance No. —." The agreements with the contractors for the work were to the effect that they should be paid "out of a special fund." It is fair to presume that the special funds have been provided by the city in all these cases, and that in due course the money will be realized to pay off the warrants. What might be the liability of the city in case it should fail, neglect or refuse to collect special taxes in such cases, is not for us to say here. It suffices that there is no present liability on the part of the city to pay out of its treasury.

In *Argenti v. San Francisco*, 16 Cal. 256, there was no restriction upon the use of the funds derived from special assessments. It went into the treasury, and its identity was lost; besides which the contract sued upon was general in its terms, obligating the city to pay. The case turned upon a question of agency. In *Atchison v. Byrnes*, 22 Kan. 65, the city failed to make a sufficient assessment, and refused to issue the bonds contracted for. In *Orcutt v. Selvig*, 10 Bush, 696, the city was held liable only for that portion of the contract which fronted land not subject to assessment. As to other frontage the contractor was relegated to the land. In *French v. Burling-*

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ton, 42 Iowa, 614, there was no intimation that the decision was placed upon any ground other than that the proposed improvement would, under the charter, have to be paid for in part out of the city treasury, the law providing for only a partial assessment upon abutting property. These cases were relied upon by the appellant, but none of them appear to sustain the argument. On the other hand, *Hitchcock v. Galveston*, 96 U. S. 341, seems to uphold the position of the respondent; and the case of *Quill v. City of Indianapolis*, 124 Ind. 292 (23 N. E. Rep. 788), clearly does so, if we are correct in our view of what the position of the city of Seattle is in reference to these warrants, viz., that whatever liability it is under is not present or absolute, but future and contingent only.

*Second:* Under its charter of 1886 the city of Seattle had the power to widen streets and to condemn such real estate as might be necessary therefor. This power was given upon the theory that it would be exercised for the special benefit of particular localities, and would be paid for by the property benefited. As required in § 101, the assessment of benefits was a part of the proceedings for condemnation, as necessary as any other part. It is shown by the record here that there was such an assessment in each case of condemnation, but that less than one per cent. of the amount assessed has been paid. With this failure to collect we have nothing to do. If the city has taken possession of the condemned lands, it is for the unpaid owners thereof to pursue such plain remedies as the law provides them. We are of the opinion that the neglect of the city does not place their claims in the category of the city's general indebtedness. The orderly progress of the business would have required that they be paid before they surrendered possession; but, if they waived their right to prepayment their resort should none the less be to the source provided by law for their re-imbursement. The

duty laid upon the city was not the payment of the awards, but the levy and collection of assessments; and until it has been fully moved to the performance of that duty and failed therein, there is no liability to pay attaching to it. *McCullough v. Mayor, etc., of Brooklyn*, 23 Wend. 458; *Sage v. Brooklyn*, 89 N. Y. 189. We therefore conclude that the street improvement warrants and the condemnation awards are not a part of the indebtedness of the city of Seattle, to be considered in this case, and this, as we understand the pleadings, relieves the case of any question arising from the claim that the city's debt June 1, 1891, exceeded five per cent. of the assessment rolls of 1889 or 1890.

The act of February 1, 1888 (page 74), permitted cities to incur indebtedness without a popular vote up to one per cent. of its taxable property. Therefore, under her assessment for 1889 of \$16,016,900, the city of Seattle could lawfully owe \$160,169, and no more, until the act of February 26, 1890, extended the limit to one and one-half per cent., viz., \$240,253.50. But, before going further, we will revert to the indebtedness sought to be validated at the election of June 1. It does not clearly appear by the ordinances that any part of the sums covered by classes 1, 2, 3 and 4 was within the one per cent. limit, and therefore valid without a vote, but the complaint does show clearly that all of class 1, and up to and including warrant No. 4250 of class 2, were warrants within the one per cent. limit, and therefore there was no necessity for any vote to render them valid indebtedness; or, in other words, warrant No. 4251, in class 2, was the first warrant which made the city debt more than \$160,169, which was then the lawful limit. That warrant was issued and dated December 7, 1889. Whatever warrants were issued, then, from No. 4251, December 7, 1889, to February 26, 1890, were void, and expressed no liability of the city.

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And here are presented three material questions: (1) Was the act of February 26, 1890 (Laws 1889-90, p. 225), a void act by reason of its having embraced more than one subject? (2) Was it void because it applied only to cities or towns having a corporate existence at the time of the adoption of the constitution? (3) Was the first clause of § 5 void because it imposed an involuntary debt upon the cities and towns to which it applied?

*First:* We hold that the act really embraced but one subject, viz., placing cities and towns upon the level of the constitution, as regarded their power to incur indebtedness. Merely incidental to this primary object was the declaration of what should be considered indebtedness within the meaning of the act, and the method of providing for its payment.

*Second:* The application of the act to cities and towns existing at the adoption of the constitution was not in violation of that instrument. True, § 10 of article 11 required the incorporation, organization and classification of cities in proportion to population; but at the same session of the legislature, by various acts, this requirement was complied with, and the same authority was conferred upon such municipal corporations as should be thereafter organized. At the date of this act it must be remembered there were no incorporated cities or towns in the state except such as had been created by special laws or charters, and there had been no law under which one could be created since the adoption of the constitution. The legislation of the session, therefore, taken *in pari materia*, was uniform and universal in its operation. That it was not all contained in one act, is not a sufficient ground for now making it wholly one-sided and unfair, which would be the result of striking out this act.

*Third:* The first clause of § 5 provides "that any indebtedness now owing by any such city or town, contracted

strictly for municipal purposes, whether the same exceeds the amount which such city or town was authorized to contract under its charter or not, is hereby validated and declared to be a binding obligation upon such city or town when the only ground of the invalidity of such indebtedness is that it exceeds the amount authorized by the charter of such city or town;" and a further clause provided that there must be a popular vote if the excess reached be beyond one and one-half per cent. Applied to Seattle, which on February 26 had warrants outstanding from No. 4251 upward, but not beyond one and one-half per cent., the effect of this section was to make all these otherwise invalid warrants as good as those within the limit of one per cent. Was the attempt to do this a void exercise of legislative power? Section 9 of article 7 of the constitution provides:

"For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes."

And § 12 of article 11 is as follows:

"The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

The constitution of the State of Illinois in 1848 contained the clause above quoted from article 7, *in hæc verba*, and in that state there are many well considered cases which hold that it is incompetent for the legislature to directly lay any burden of taxation for municipal purposes upon the cities of that state. See *People v. Mayor, etc.*, 51 Ill. 17. In other states not having such a constitutional provision the power of the legislature over municipal corporations has, in some cases, been held to be well nigh omnipotent, as in *Sage v. Brooklyn, supra*. We find no



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case, however, in which such a constitutional expression occurs as is contained in our article 11, above quoted, and, whatever may be thought elsewhere of the Illinois decisions above quoted, they would seem to be cogent authority here. But this is not a case of original compulsion of the city of Seattle. Its municipal authorities, in the strait of an overwhelming public calamity, to rebuild and protect the city, overstepped the line of legalized indebtedness, and for the strictest municipal purposes issued the warrants from December 7, 1889, to February 26, 1890. Value in goods and labor was fully paid for these warrants, and the holders of them have at all times had the strongest moral claim for their liquidation. At all times from December 7, 1889, until the passage of this act, the constitutional limit, without a popular vote, was one and one-half per cent., the necessarily tardy action of the legislature alone delaying its extension of the power. Indeed, under the act of 1888 it is altogether likely that a majority vote of the people of the city could have authorized the issuance of every one of the excess warrants. We are therefore constrained to view this case as one within the principle long sustained by the courts, that where a municipal corporation has done an act beyond its statutory powers, but within the powers which it was competent for the legislature to have conferred upon it, the act may be validated by a curative statute. Dill. Mun. Corp. (4th ed.), §§ 79, 544, and cases cited. We have carefully examined the Illinois cases cited, viz., *Marshall v. Silliman*, 61 Ill. 226, and the series of cases following it in that state; but, especially in view of the grudging approval of them by the supreme court of the United States in *Township of Elmwood v. Marcy*, 92 U. S. 289, we do not think they should be authority here. They were railroad aid cases, in which there were numerous flagrant irregularities, and the purpose was in no case municipal. But, while curative acts

of the legislature of Illinois were set aside by the supreme court of that state, and the rule was upheld by the supreme court of the United States because of its long prevalence there, and in accordance with the decision of the highest court of the state from which the case came, the federal court has generally held the other way, and sustained like curative legislation. See cases cited in *Dillon*, and *New Orleans v. Clark*, 95 U. S. 644.

From February 26, 1890, there was a short period when, according to the pleadings, the indebtedness of the city of Seattle did not exceed the one and one-half per cent. limit. The warrants covering this period, although they needed no validation, were also included in the classes submitted for validation at the election of June 1st. Then, however, there followed a class of warrants the last of which, payable out of the road fund, was issued August 2, 1890, and the last of which, payable out of the fire fund, was issued August 16, 1890, all of which it is agreed were in excess of the one and one-half per cent. limit, and were without any legal authority until March 7, 1891, when the act of that date, providing for an election for the validation of such warrants was passed with an emergency clause. Strictly, the act had no application to any of the warrants included in the propositions to validate, excepting those here spoken of, although some doubt as to the construction of the former acts may have justified the submission of all to the test of a vote. The criticism made to the act of February 26, 1890, that it was not general, but applied only to cities and towns "now having a corporate existence in this state," is renewed to this act; but there is no propriety in the objection. It is a curative act, and only applies to what had been done before the date of its passage. If, instead of the objectionable words, the act had read, "any city or town," the effect would have been just the same.

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Far more important is the next objection, that, constitutionally, no municipal corporation can create or in any manner validate a debt in excess of the one and one-half per cent. limit, without a vote previously had to authorize it. In treating the other branches of this case we had to examine—(1) the city's inherent powers, which do not include the creation of any indebtedness; (2) the power of the legislature to compel the assumption of obligations; and now we have to do with the legislature's powers to authorize indebtedness. But for the restriction of the constitution, the legislature could compel the state's municipalities to assume the most onerous burdens or give up their corporate existence. The idea of home rule, however, is strongly pre-eminent in our constitution, and we have seen that, while cities may not become indebted in any sum, for any purpose, beyond their current revenues, without the consent of the legislature, on the other hand the legislature has no power to force upon them any undertaking which will involve the expenditure of money without the consent of the municipal authorities or the people. The legislature has seen fit, however, to commit to the city government the authority to create debts for municipal purposes up to the constitutional limit of one and one-half per cent., at their own discretion.

Section 2 of the act of February 26, 1890, and the other acts of that session, then went further, and permitted a further indebtedness up to the five per cent. limit, whenever three-fifths of the voters therein assent thereto. This we conceive to mean that, before any such additional debt shall be lawfully created, an election shall have been had, and the authority voted. But here the vital question appears whether the legislature is bound by the terms of the constitution, so that it can, under no circumstances, permit the vote of assent to be taken after the benefit for which the debt is sought to be undertaken has been re-

ceived. The state, by its constitution, consented that there be a debt of five per cent., the legislature assenting thereto. The language of the constitution is not certain to the effect that the legislature must provide for an antecedent vote. Construction alone can make the language certain. That construction is, under all rules, to be in favor of the freedom of the legislature; the constitution being an instrument containing restrictions upon the legislative power, which would otherwise be universal and unlimited. The legislature has by the act of March 7, 1891, placed its construction upon the constitutional provision; and, unless it has done violence to the necessary construction of the provision, its construction is entitled to stand. What are the facts? The legislature had full power to consent to the authorization of indebtedness beyond one and one-half per cent. It and the people alone are concerned, and they have agreed that up to the date of the act of March 7 the vote might follow the act of the municipal authorities in accepting service and goods for the use of the city, and that, having been so accepted, they may be paid for. It is not the best policy for a city to pursue. Its obligations beyond the one and one-half per cent. are void. The legislature might refuse to exercise its authority, and the people might decline to give their votes of assent. But, having done so, we believe it would be overstepping the bounds of judicial necessity were we to hold their acts to be void and unconstitutional. Circumstances have little weight with judicial decisions, but we cannot fail to remember that our constitution was framed while the smoke of overwhelming and unprecedented calamity yet hovered over some of our most thrifty and promising communities; that the very provisions we are discussing, which make large allowances for municipal indebtedness, were framed with a view to their habilitation and further preservation; and that the legislation which followed was cast in the same mold,

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through a universal desire that in no portion of her commonwealth should the public credit of the state be tarnished or depreciated. The vote by which the validation in this case was accomplished was not merely three-fifths to two-fifths, but more than ten to one, showing an almost unanimous desire of the people of Seattle to assume and pay their excess liabilities. It would border upon tyranny were the rest of the state to stand in the way of so patriotic a sentiment. We do not find any impediment in the constitution, and therefore the act of March 7 is conclusive.

There were some minor objections to the issuance of the bonds in question which we shall now notice. The city council passed ordinance No. 1706, calling the election on June 1st, on the question of the validation of the excess indebtedness; and it also passed ordinance No. 1707, calling an election upon the same day, under the act of March 7, 1891, p. 269, to determine whether bonds should issue covering the indebtedness sought to be ratified, and other existing indebtedness of the city embraced in the four classes of warrants hereinbefore mentioned. The additional points raised mainly relate to the ordinance No. 1707, and will be treated *seriatim*.

*First:* There was but one notice of election embracing the two ordinances. Under the statute but one election was provided for, although there were to be separate votes on the separate propositions. We hold that but one notice was required or proper.

*Second:* Before the election was ordered, the city authorities entered into a contract with N. W. Harris & Co., of Chicago, Ill., the substance of which was that the election should be called, and that whatever of the warrants in the said four classes should be valid warrants on the 1st day of July, 1891, should be funded by the issuance of city bonds, which should be sold to Harris & Co., they agreeing to take them upon terms specified. The question

whether this contract should be carried out was also submitted to vote at the election under ordinance No. 1707. The act of February 26, 1890, simply provided in general terms for the issuance of bonds to fund indebtedness, leaving the details of issue entirely to the municipal authorities. In *Yesler v. Seattle*, 1 Wash. 308 (25 Pac. Rep. 1014), we held, in relation to a similar matter, that it was not proper for the city council to submit these details to the popular vote; and under the act of February 26, 1890, it would seem that it is not necessary that the question of funding ever be submitted. But the act of March 7, 1891, p. 269, seems to imply that in the cases covered by it the question of funding should be submitted, though the details of the funding are here omitted also. Recurring, however, to the act of March 24, 1890, p. 215, which confers the powers of cities of the first class, we find in the fourth subdivision this authority:

“*Fourth*: To borrow money for corporate purposes on the credit of the corporation, and to issue negotiable bonds therefor on such conditions and in such manner as shall be prescribed in its charter.”

The charter of October 1, 1890, of the city of Seattle, in the fifth subdivision of § 22, art. 4, empowers the city council to borrow money for corporate purposes on the credit of the city, and to authorize the issue of negotiable bonds therefor in accordance with the charter and the constitution and laws of the state. This, under the law, would leave the matter of issuing bonds to the wisdom of the council, both as to the propriety of the issue and the details. But by § 30, art. 4, there is this further provision:

“When loans shall be created exceeding one and a half per centum of the taxable property in the city, and bonds therefor issued by the city under this charter, the city council, in authorizing and providing for the same, shall direct the times and manner of payment and rates of interest; but no such bonds shall be issued except as pro-

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vided by law, nor unless the proposition for creating such indebtedness shall have been previously submitted to the electors of the city at a regular general or special election, of which thirty days' notice shall have been published in the city official newspapers, and such proposition shall have then received the assent of three-fifths of the voters voting at such election. The mode and manner of submitting such proposition to the voters shall be prescribed by ordinance. And, in case such three-fifths of the voters are in favor of such loan, the city council may, after such election, by ordinance confirm the loan; but no bonds shall be issued therefor until after such confirmation, nor until the city council shall have made specific provision for payment annually of interest on such bonds, and for a fund to pay the interest on such bonds, and a sinking fund to be raised by annual tax at least five years before the bonds are due, sufficient to pay and discharge such bonds at maturity; and the faith and property of the city shall be and is hereby pledged for the final payment of any and all such loans."

Inasmuch as a part of the bonds proposed in this instance were to fund indebtedness in excess of one and one-half per cent., § 30 made it necessary to submit the entire proposition in substantially the form in which it was submitted, and there was no error.

*Third:* The amount of bonds proposed to be issued and voted was \$460,000. The face of the warrants to be funded is \$370,979.44, and the interest accrued thereon was estimated in ordinance 1707 to be \$48,200.56, making a total of \$419,180. Objection is made that the proposition to fund was indefinite as to amount, and for that reason cannot stand. There is no perceptible reason why the sum needed could not have been reached without leaving so wide a margin as the difference between \$460,000 and \$419,180. But the only authority given the city officers is to issue bonds to an amount sufficient to take up the warrants, the face value of which is \$370,979.44, and the legal interest thereon; and until it shall appear that they are about to exceed that authority there would be no

just cause of complaint. It is presumed that all officers concerned in the issuance of these bonds will strictly follow their authority in the premises, as any departure therefrom would subject them and their bondsmen to personal liability.

*Fourth:* Some question was made as to whether the ordinance should not have provided for bonds of the kind prescribed by the act of March 26, 1890, p. 520, but we do not consider any of the provisions of that act as applying to any bonds other than those specially provided for therein, viz., for those issued to raise money for water, sewer, or light plants. The judgment of the court below is therefore affirmed.

ANDERS, C. J., and HOYT, SCOTT, and DUNBAR, JJ.,  
concur.

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[No. 149. Decided July 20, 1891.]

AMERICAN BUILDING AND LOAN ASSOCIATION V. ALBERT  
D. HART AND FRANK C. FAXON.

PRINCIPAL AND AGENT—VIOLATION OF CONTRACT—DAMAGES—  
EVIDENCE—REFRESHING MEMORY—ADMISSIONS.

In an action for breach of a contract whereby plaintiffs were appointed general agents of the defendant building association with sole authority to solicit members and collect admission fees in certain territory, plaintiffs will be entitled merely to nominal damages, where the only material showing at the trial was that sales had been made by other parties in plaintiffs' territory without their knowledge or consent, and there was no proof of the number of shares sold nor of the actual damage resulting therefrom to plaintiffs.

A party testifying as a witness cannot refresh his memory of the number of shares of stock sold by referring to a written list copied by him from an extract of the record made by an under clerk of the building association; nor is the admission of the president of the association, to whom the original had been shown, that "it was cor-



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rect in the total," competent evidence, when the paper shows no total.

*Appeal from Superior Court, King County.*

The facts are sufficiently stated in the opinion.

*Preston, Carr & Preston*, and *W. S. Bush*, for appellants.

*John H. Elder, Sidney M. Logan*, and *J. K. Brown*, for appellees.

The opinion of the court was delivered by

STILES, J.—Appellees sued for damages for the violation of a contract dated October 1, 1888, and containing the following provisions:

"*First.* The party of the first part agrees to appoint, and does hereby appoint, said parties of the second part general agents for the said first party for the following territory, to wit: The territory of Washington, with exclusive control of the same: *Provided*, That Messrs. Hurd, Beck, & Baker shall be allowed to organize local boards in Ellensburg and North Yakima, and to work in Seattle until October 13, 1888. Said parties of the second part are given authority to solicit members and collect admission fees, organize local boards, and appoint sub-agents in such territory, such agency to terminate upon the termination of this contract."

"*Third.* That said first party agrees to allow said second party, as compensation for such services, one hundred per cent. of the admission fee collected by them on all applications secured by them; also a renewal interest of two cents per share per month on all business done in Washington Territory by themselves or others, except that done by Messrs. Hurd, Beck & Baker in the towns excepted above; also admission fees remitted to the home office of sub-agents of second parties: *Provided*, That on paid-up stock second parties shall be allowed two dollars per share at the time of sale, and fifteen cents per year thereafter."

The breach alleged was that the appellant association, after the making of the agreement, and after October 13,

1888, permitted Messrs. Hurd, Beck & Baker, as its agents, to organize local boards of the association, and appoint local agents thereof, in the State of Washington, and that against the protest of the appellees, and with the knowledge and consent of the association; and that as its agents they "did wrongfully solicit members of said association to the number of about 194, and did solicit, take and receive from said members, for the sale of stock of the defendant association, and for admission fees therein, the sum of \$3,035." The complaint also contained a claim for damages for injured credit, which was abandoned; and a further claim for "renewals" amounting to \$485.60, which seems to have been also lost sight of, if not altogether abandoned. The answer admitted the contract, but claimed the actual date of its execution to have been October 13th instead of October 1st. It denied the breach alleged, but set up affirmatively that Hurd, Beck & Baker, under an agreement between them and the appellees, had subsequently to October 13th sold 3,000 shares of stock in Washington.

At the trial a multitude of issues were assumed to be in the case, but we can find but two that were left open by the pleadings, viz.: (1) Were the sales of 3,000 shares of stock by Hurd, Beck & Baker made under any agreement with Hart & Co. (2) If not, then there having been a breach of the contract, what was the damage to the appellees by reason of the breach? It must be borne in mind that the complaint alleged that stock was sold, without mentioning any number of shares, but also stated that the association had received from the sale of stock and for admission fees \$3,035; while the answer admitted the sale of 3,000 shares but denied the receipt of any sum for stock or admission fees. The fact was that Hurd, Beck & Baker had had the same kind of a contract with the association as that given to Hart & Co., and they retained whatever they collected for their own account, claiming to act under a

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special arrangement with Hart & Co., which extended or continued the right to represent the association on the old terms.

This state of the pleadings left it incumbent upon the appellees to prove to the satisfaction of the jury that shares were sold, whether 3,000 or any other number, in violation of their contract, and, within some reasonable degree of certainty, the actual damage to them resulting therefrom. Definite mathematical certainty would be nearly impossible in such a case, but, to recover more than nominal damages, there must be something like a basis for the jury to estimate from. They cannot be left to a mere guess. At the trial, however, the plaintiffs' case produced nothing material beyond a showing that the stock sales complained of were made without their knowledge or consent. It might have been expected, from the indefiniteness of the complaint and the contract, that some testimony would have been adduced showing what kind of a business this was that the association was conducting, and generally the method of disposing of its stock, for which the appellees engaged their time and labor; also what an "admission fee" was, of which they were to receive one hundred per cent.; and what was meant by a "renewal interest." But nothing of the kind was attempted even. One of the plaintiffs, while a witness, presumably for the purpose of showing that more than 3,000 shares had been sold, produced a paper which he claimed to have obtained from records in the association's office, containing what may be called a "description list" of certificates of shares issued to divers persons, and was asked this question:

"What is the total of that—the number of shares of stock they sold?"

To which he answered, in no way responsively:

"Well, the total amount of admission fees was \$3,035. Sold in lots under ten shares, the admission fee was more

than one dollar, and the amount of admission fees, total of \$3,035, would be a trifle less than the number of shares—total number involved.”

Now, it might be, perhaps, inferred from this irresponsible answer, which was the only remark on the subject in the whole case, that an ordinary admission fee was one dollar, but that in lots of less than ten shares the fee was more than one dollar. But was the fee per member or per share? From the rest of the answer we might infer it to be per share were it not for the complaint, which says that \$3,035 was received for “stock” and “admission fees.” How much, then, was for stock, in which appellees had no interest, and how much for fees, of which they were entitled to one hundred per cent.? But these are mere guesses of our own, which a jury has no right to make, or to be required to find a verdict from. But on the point of actual damage there was no testimony at all. Plaintiffs seemed to proceed upon the theory that, having shown that Hurd, Beck & Baker had received \$3,035 from these sales, that would be the measure of their recovery against the association, as though the suit were for money had and received, forgetting that the action was for breach of the contract. The jury apparently saw the point of the dilemma, for they awarded but \$1,500, though as a deduction from what facts in the case we are unable to discover. The court should have charged the jury that, under the evidence, if they found the sales of stock made by Hurd, Beck & Baker, subsequent to October 13, 1888, to have been made without the knowledge or assent of Hart & Co., they should find for the plaintiffs, and assess nominal damages; but otherwise they should find for the defendant. Not having so charged, the judgment must be reversed and a new trial had. The motion for a nonsuit was properly denied, as the plaintiffs’ showing was that the sales had been without their knowledge or consent, and against their protest.

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Upon the new trial, in order to recover more than nominal damages, the plaintiffs should show that, if whatever shares of stock were sold in violation of their contract had not been so sold, they would have reaped some advantage therefrom, and approximately what that advantage would have been in money. It will not do to say that because Hurd, Beck & Baker sold, say 3,000 shares, therefore Hart & Co. would have sold the same shares; nor will it be correct to consider admission fees as net profit, without considering the outlay connected with collecting them. These points must be made as certain as experience in the business and the nature of the case will permit before a jury will be warranted in finding a verdict.

The so-called "subscribers' list," from which the witness Hart was allowed to refresh his memory, was not competent either as a "refresher" or as evidence. Plaintiffs had the admission that 3,000 shares were sold after October 13, and there was nothing about this list to show that any share represented upon it was sold after that date in addition to the 3,000 admitted. Moreover, it was a mere extract of book memoranda made by an under clerk at the office of the association, for what purpose does not appear, and could be taken as no admission of the corporation. No, it was not even that; but only what purported to be a copy of such an extract, made by the witness from the original, which was on file with some referee. The witness had shown the original to the president of the association, and asked him if it was correct; to which he replied that he "didn't know specifically about each particular name, but it was correct in the total." But the paper shows no total. There was no materiality in either of the letters offered, under the view we take of the case, though appellant cannot complain of that of April 29, 1889, since the record shows it to have been introduced by that side. We think it not necessary to review the court's instructions, as the

proper scope of instruction on the new trial has already been indicated.

ANDERS, C. J., and DUNBAR, J., concur.

HOYT and SCOTT, JJ., not sitting.

[No. 160. Decided August 1, 1891.]

THE TACOMA COAL COMPANY v. E. H. BRADLEY AND  
M. A. BRADLEY.

BREACH OF WARRANTY — DAMAGES — BURDEN OF PROOF — EVIDENCE  
— RELEVANCY.

Where there was a warranty of the quality of brick ordered for the construction of coke ovens, and in an action for the purchase price of the brick the defendant sets up a breach of such warranty as a counter-claim, it is error to instruct the jury "that if the defendant, before using the same, had an opportunity to inspect said goods and did not do so, and if, upon such inspection, could have ascertained the defects claimed, then said defendant is not entitled to any damages."

A vendee may retain goods after knowledge of their defects, without giving notice to the vendor thereof, and, in an action by the vendor for the purchase price, plead breach of warranty for the purpose of recouping damages.

Where, in an action to recover the price of brick, the defendant alleges a warranty or its equivalent, and a breach thereof, the burden is on defendant to prove both the warranty and the breach.

Where defendant relies upon the falling in of the coke ovens as proof of the poor quality of the brick, it is not erroneous to instruct that "if the falling in of said ovens was caused by a misconstruction of the same, or any defects in said construction or material used therein, other than the goods involved in this controversy, or the misuse of said oven subsequent to said construction, the defendant is not entitled to any damages."

Where a letter is part of the correspondence between parties concerning the subject of fire brick, specifying the price thereof and containing statements as to the quality of the brick which plaintiff proposed to sell defendant, the mere fact that other brick

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had been shipped to defendant just previous to the order for those in controversy does not render the letter irrelevant or immaterial, although it does not specifically refer to the brick in controversy.

*Appeal from Superior Court, Pierce County.*

The facts are fully stated in the opinion.

*Sheeks & Goodwin*, for appellant.

*Snell & Bedford*, for appellees.

The opinion of the court was delivered by

ANDERS, C. J. — This action was brought by the respondents to recover from the appellant the sum of \$524.91, and interest, for certain fire brick alleged to have been sold and delivered by the former to the latter between June 23 and August 6, 1888, at the agreed price of \$15 per thousand. The defendant admitted in its answer to the complaint the delivery of the brick as alleged by plaintiffs, but denied that the same were worth the sum of \$524.91, or any greater sum than \$120; denied that \$15 per thousand was a fair and reasonable price therefor, or that it agreed to pay that price; but admitted that it had not paid for the brick. As a counter-claim against the plaintiffs' demand, the defendant alleged that, at the time it ordered the brick, it specifically informed the plaintiffs that they were to be used in the construction of coke ovens, and that it only agreed to purchase of plaintiffs such brick as were suitable for that purpose; that the brick shipped by plaintiffs to defendant, except about 8,000 thereof, were utterly worthless, as the plaintiffs well knew, for building such ovens; that the defendant received said brick, relying upon the good faith and representations of plaintiffs, and were unable to discover the worthlessness of said brick until the same had been used in the construction of coke ovens, which defendant constructed properly and of good material, with due skill and care; that all of said ovens constructed

of the brick furnished by plaintiffs to defendant, except the 8,000 admitted to be of good quality, did, immediately upon use, and owing solely to the negligence of the plaintiffs in the manufacture of said brick, fuse, melt and fall in, and were utterly worthless; that, as soon as the defendant discovered said worthlessness of said brick, it notified plaintiffs thereof; that, by reason of the negligence of the plaintiffs in furnishing defendant with brick unsuitable for the construction of coke ovens, the defendant was damaged on account of freight paid for carriage of said brick \$2,000, for labor in construction of said coke ovens \$250, and on account of defendant's loss of manufacture and sale of coke, in the sum of \$1,500; that it was damaged in all, after deducting \$120 for good brick, in the sum of \$4,630, for which sum it prayed judgment against plaintiffs. Plaintiffs denied each and every allegation of defendant's counterclaim, and upon the issues thus joined a trial by jury was had, resulting in a verdict for plaintiffs for the sum claimed in the complaint.

It appears from the record that the respondents were engaged in the manufacture and sale of fire brick at Layton Station in the State of Pennsylvania, and that appellant, a corporation, was engaged in the manufacture of coke at Wilkeson, in the territory (now state) of Washington. It also appears that the witness J. M. Kelly was employed by appellant to superintend the construction of its coke ovens; that he knew the character of brick made by respondents, having formerly resided in Pennsylvania; that he was personally acquainted with respondent E. H. Bradley; and that he ordered, or caused to be ordered, by letter, the brick in controversy. It further appears that, previous to ordering the brick in question, appellant had ordered and received twenty-eight or thirty thousand brick from respondents for the same purpose for which the latter were required, and that they had been used in building or



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repairing coke ovens. It was not contended on the trial that respondents did not know the use to be made of the brick by appellant. Respondent E. H. Bradley, testifying in his own behalf, admitted that he knew the brick were to be used in constructing coke ovens; and on May 17, 1888, Superintendent J. M. Kelly wrote a letter to Bradley concerning these brick, in which he stated:

“I sent an order to Tacoma to-day for 26,000 more crown bricks, and jams and arches for nine more ovens, and 1,500 bottom tile. I suppose they will order from you. I want you to be very careful about the quality. Do not send anything but what is A No. 1, and send as quick as possible.”

And again on May 24, 1888, he wrote:

“I sent an order to general office yesterday. I named 26,000 crown brick. When the order reaches you, you will see what I want. Make the order 28,000 crown brick. Send me the best. This is a trade you will want to hold, and you can only do it by sending nothing but the best.”

On the trial the claim for damages on account of loss of sale of coke was abandoned, and no very satisfactory testimony appears respecting other items of damage claimed, although some testimony was adduced tending to show the amount paid for freight and for constructing ovens claimed to have been worthless.

There can be no doubt that the contract between the parties amounted to a warranty on the part of the respondents of the quality of the brick ordered by appellant, and the respondents seemed to have recognized this fact on the trial, and very properly produced testimony tending to show that they had discharged their obligation to appellant by sending the character of brick required by the latter. But counsel for respondents insist that, if the brick were defective in quality, and not such as were ordered, the defect was patent; and that appellant having inspected them, and having failed to return or offer to return them,

can claim no damage on account of such defect. The court below seems to have adopted the view of counsel, and instructed the jury as follows:

“10. You are further instructed that in case you find a warranty of quality by these plaintiffs of the goods in question, and a breach thereof, then, in all events, the plaintiffs would only be responsible for such damage as the difference in the price of said goods as represented and the value of the goods as they really were, together with such other damages as were the direct and immediate consequence of the said breach; but that if the defendant, before using the same, had an opportunity to inspect said goods, and did not do so, and if upon such inspection could have ascertained the defects claimed, then said defendant is not entitled to any damages.

“11. You are further instructed that if the defendant retained and used said goods after a knowledge of their defects, without notifying plaintiffs of such within a reasonable time, it waives its right to recoup for damages.”

Appellant claims that these instructions do not state the law correctly, and should not have been given to the jury. We think these instructions were erroneous, and that appellant's position must be sustained. Authorities are cited in the brief of counsel from New York and Wisconsin to sustain the correctness of these instructions. But, the New York authorities simply hold that in cases of executory contracts for the sale and delivery of personal property in the absence of a warranty and a breach, the vendee's right to recover damages does not survive the acceptance of the property, after an opportunity to discover defects, unless notice has been given to the vendor, or the vendee returns or offers to return the property. The rule is there held inapplicable in cases of express warranty of quality. These decisions do not, therefore, support respondent's contention to the extent claimed. See *Canning Co. v. Metzger*, 118 N. Y. 260 (16 Am. St. Rep. 753; 23 N. E. Rep. 372); *Manufacturing Co. v. Allen*, 53 N. Y. 519. The

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Wisconsin cases, cited by counsel, declare the doctrine in that state to be that if chattels sold under a warranty, express or implied, are defective or unfit for the use intended, and the defects were not open and palpable, and were unknown to the purchaser when he received the goods, he may, if sued for the price, without returning or offering to return the goods, and without notifying the vendor, recoup such damages as he may have sustained on account of such defects. See *Olson v. Mayer*, 56 Wis. 551 (14 N. W. Rep. 640); *Barb Wire Co. v. Phillips*, 67 Wis. 129 (30 N. W. Rep. 295). In the case at bar the evidence is conflicting, and does not satisfactorily show that there was any patent and obvious defect in the brick in question. One of the plaintiffs, while claiming that the brick were of the quality ordered, testified that "a man who understands fire brick can, nine times out of ten, tell whether or not brick are good by looking at them." On the contrary, Kelly, who was a man experienced in building coke ovens, testified, substantially, that he knew of no method of ascertaining whether the brick were fit for such a purpose other than actual use. But, be that as it may, we are of the opinion that the appellant had a right to assume that the brick were of the quality ordered, and to act accordingly, and that appellant violated no duty it owed to respondents in failing to search for imperfections before using them.

It is undoubtedly true that if the brick were defective, and appellant was silent, and did not give notice or offer to return them within a reasonable time after discovering defects, the right to rescind the sale was thereby waived. But the right to recover damages on account of defective quality was in no wise affected. Benjamin on Sales (Bennett's notes, 1888), § 901. It is also true that in such cases a failure to give notice or to offer to return the goods would have an important bearing upon the question of

warranty, and would raise a strong presumption that the goods received were of satisfactory quality. *Babcock v. Trice*, 18 Ill. 420 (68 Am. Dec. 560); Abbott, Trial Evidence, p. 348. That the vendee may retain the goods without notice, and plead breach of warranty, in an action by the vendor for the purchase price, is shown by numerous authorities. *Dayton v. Hooglund*, 39 Ohio St. 671; *Polhemus v. Heiman*, 45 Cal. 573; *Holloway v. Jacoby*, 120 Pa. St. 583 (15 Atl. Rep. 487); Benj. Sales, § 903; *Id.*, p. 867, and cases cited; *Babcock v. Trice*, *supra*; *Bagley v. Rolling Mill Co.*, 22 Blatchf. 342 (21 Fed. Rep. 159).

The following instructions to the jury are objected to by the appellant:

“8. Fraud is never presumed, but must be affirmatively proven by the party alleging the same. The law presumes that all men are fair and honest, that their dealings are in good faith, and without intention to disturb, cheat, hinder, delay or defraud others. Where a transaction, called in question, is equally capable of two constructions, one that is fair and honest, and one that is dishonest, then the law is that the fair and honest construction should prevail, and the transaction called in question should be presumed fair and honest.

“9. You are instructed that, in so far as the defendant relies upon a warranty of quality of the property sold and a breach of the same, the burden of proving the warranty is upon the defendant, and, unless it has proved both the warranty and the breach alleged by a preponderance of evidence, it will not be entitled to any benefit therefrom in the suit.

“12. If you believe from the evidence that the falling in of said ovens was caused by a misconstruction of the same, or any defects in said construction or material used therein other than the goods involved in this controversy, or the misuse of said oven subsequent to said construction, the defendant is not entitled to any damage herein.

“13. You are instructed that in no event is plaintiff liable for any damages for expected profits to be obtained from the sale of merchandise produced by said ovens, in

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which goods in controversy were to be used, unless the contract for the same were specially and specifically made known to plaintiff at the time of the purchasing of said goods, and that he understood that they were for that purpose.

"14. You are further instructed that the law is that a known, defined and described article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined and described thing be actually shipped, there is no warranty that it shall answer the particular purpose intended by the buyer.

"15. You are further instructed that if you believe from all the evidence that the defendant, after a discovery of the alleged defects, agreed to pay for said goods, and said nothing about damages to the plaintiff, and made no demand therefor, then it will be taken to have waived all right to such damages."

The ninth instruction is unobjectionable. The defendant having alleged a warranty or its equivalent and a breach thereof, it was incumbent upon it to prove both in order to be entitled to any benefit therefrom. It is contended that there was no evidence to justify either the eighth, thirteenth, fourteenth or fifteenth instructions, and that each of them was calculated to mislead and confuse the jury. As to the eighth, thirteenth and fifteenth instructions, the point is well taken. The twelfth instruction was properly given. The fact that the ovens fell down was relied on by the appellant as positive proof of the unfitness of the brick. If the falling was caused by unskillful construction or defective material other than that involved in this controversy, or subsequent misuse of the ovens, then there was practically no proof of poor quality, and there could therefore be no damage.

Appellant also claims that it was error for the court to refuse to admit its exhibit 1 in evidence. That was a letter written by E. H. Bradley to Superintendent Kelly, concerning prices and quality of brick sold by him, and

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Statement of the Case.

[2 Wash.]

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concerning freight rates to Tacoma. It did not specifically refer to the brick in controversy, but it was a part of the correspondence between the parties concerning the subject of fire brick, and was the only communication shown specifying the price of the brick. It contained statements as to the quality of the brick which the respondents proposed to sell to appellant, and the mere fact that other brick had been shipped to appellant just previous to the order for those in controversy did not, in our opinion, render the letter irrelevant or immaterial. It should have gone to the jury for what it was worth.

The judgment of the court below is reversed, and the cause remanded for a new trial.

STILES, HOYT, SCOTT, and DUNBAR, JJ., concur.

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[No. 188. Decided August 1, 1891.]

MILTON L. BAER v. MORAN BROTHERS COMPANY, a  
*Corporation.*

**PUBLIC LANDS—LOCATION OF VALENTINE SCRIP—TIDE LANDS.**

A tract of land, shown by the public surveys to be a portion of the bottom of Elliott Bay, an arm of the sea, and which is covered and uncovered by the flow and ebb of the tide, is not "land," but "water," to which none of the public or special and private land laws of the United States, including the Valentine scrip act, have any application.

As the rule is a fixed one that high water mark is the limit of government grants, the fact that a portion of tide flat is uncovered at low tide, and, in consequence, not covered by navigable water, will not render such tide flat subject to entry under the act of congress (17 St. at Large, p. 649) known as the Valentine scrip act.

*Appeal from Superior Court, King County.*

Action in ejectment by Milton L. Baer against the Moran Brothers Company, a corporation, for a tract of tide land

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included within a larger tract selected and located by plaintiff with Valentine scrip. A demurrer to the complaint was sustained, and from the judgment dismissing the action plaintiff appeals.

*Beriah Brown, Jr.*, for appellant.

*J. C. Haines*, for appellee.

The opinion of the court was delivered by

STILES, J.—The appellant brought ejectment for the following described real estate in King county, viz.:

“Beginning at a point 688 feet south and 660 feet west of the east one-quarter post of section six, township twenty-four north, range four east, W. M.; thence west one hundred and fifty feet; thence south two hundred and ten feet; thence east one hundred and fifty feet: thence north two hundred and ten feet, to place of beginning—being the premises covered by Moran Brothers Company’s foundry and machine shop.”

The complaint showed the plaintiff’s ownership of Valentine scrip E, No. 199, for forty acres, and that on the 23d day of September, 1889, “he duly selected the following described tract of unsurveyed land for location thereunder, to wit: Beginning at a point one hundred and sixty rods south of the northeast corner of section six, township twenty-four north, range four east, W. M.; thence west eighty rods; thence south eighty rods; thence east eighty rods; thence north eighty rods, to the place of beginning—containing 40 acres—which said tract of land, when surveyed, will conform to the general system of the United States land surveys, and will be known and designated as the ‘northeast quarter of southeast quarter of section six, township twenty-four north, range four east, W. M.’”

The complaint then proceeds:

“12. That this plaintiff selected the said tract of land in the manner following, to wit: On the said 23d day of

September, 1889, this plaintiff filed with the register and receiver of the United States land office at Seattle, Washington, a notification that in pursuance of the act of congress approved April 5, 1872, the said plaintiff had selected the said tract of land [describing it], together with an affidavit of this plaintiff to the effect that the said tract of land was not mineral in character, and at the said time and place the said plaintiff filed with the said register and receiver of said United States land office the said piece of scrip, numbered E, No. 199, for cancellation, and tendered to said receiver the sum of two dollars, being the amount of fees allowed by law to the register and receiver of United States land offices in the Territory of Washington, on the entry of forty acres of land with Valentine scrip.

“13. That the said tract of land so selected by said plaintiff was, at the time of its selection by said plaintiff, unoccupied and unappropriated public land of the United States, not mineral, in this: That the said tract of land was situated in the Territory of Washington, was a portion of the tide flats, was covered and uncovered by the flow and ebb of the tide—uncovered at ordinary low tide, and was covered with water at ordinary high tide—and had never been set apart by the United States for any particular use; that the said tract, or any portion thereof, was not in the possession of any person claiming or intending to claim any title thereto under or in pursuance of any statute or treaty of the United States, and the said tracts were not chiefly or at all valuable for mineral, and that the Indian right of occupancy thereto had been extinguished.”

A general demurrer to the complaint was sustained in the court below, and, on the plaintiff's refusal to plead further, judgment was rendered for the defendant, dismissing the action. The appellant contends: (1) That the “Act for the relief of Thomas B. Valentine” was a grant upon conditions which have been strictly performed, whereby the title vested, citing *Rutherford v. Greene's Heirs*, 2 Wheat. 198, and other cases involving the construction of congressional donations of public lands. For the purposes of this decision, the proposition may be ac-



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cepted without discussion. (2) That on the 23d day of September, 1889, the tract in question was public land of the United States (Washington then being a territory), and that Congress could at all times up to that date dispose of it as it saw fit; citing *Insurance Co. v. Canter*, 1 Pet. 542; *Goodtitle v. Kibbe*, 9 How. 471; *Case v. Toftus*, 39 Fed. Rep. 733. This point, also, may be admitted for the sake of the argument. (3) That said tract, not having been reserved by competent authority, or not occupied in good faith by intending claimants under the United States land laws, was subject to selection by Valentine or his assigns in satisfaction of his grant. Upon this proposition the issue in the case is made, and upon its determination the appeal will succeed or fail.

The act of April 5, 1872 (17 St. at Large, 649), commonly known as the "Valentine scrip act," authorized Thomas B. Valentine, or his legal representatives, in lieu of lands claimed by him in the Rancho Arroyo de San Antonio, in the county of Sonoma, California, to select and have patents for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and if unsurveyed when taken, to conform when surveyed to the general system of United States land surveys. The complaint, as above quoted, contains allegations which negative any claim that this tract was occupied or appropriated in pursuance of any statute or treaty of the United States, or was mineral in character, or had been reserved, or was subject to an Indian title. These allegations, and the *pro forma* admissions under the first and second points, strip the case of every defense except that the tract in question was not "public lands," within the meaning of the act of 1872. In our view it was not such land, and for the following reasons:

1. The complaint shows that it is a portion of the tide flats, is covered and uncovered by the flow and ebb of the tide, being uncovered at ordinary low tide, and covered at ordinary high tide; and by reference to the public surveys we find that it is a portion of the bottom of Elliott Bay, an arm of the sea, in front of the city of Seattle.

2. Within the meaning of the acts of congress, and the policy thereby clearly established from the earliest times, the decisions of courts, and the general understanding, this is not "land," but "water," to which none of the public or special and private land laws, including the Valentine scrip act, have any application. It may be conceded that congress, by clear and explicit enactment, could have granted the bottom of navigable waters to any person it saw fit before the admission of the state, but it will not be contended that the language of the Valentine scrip act is to receive any construction other than that awarded to the hundreds of other acts which relate to the "public lands" subject to Mr. Valentine's selection, or that the lands therein meant are any lands different from those subject to entry under the pre-emption, homestead, and other laws. Therefore it is but proper that, in construing this act, reference should be had in this manner to the hitherto universally sustained rule that "public land" means upland, and not soil beneath navigable waters. The supreme court of the United States, in the case of *Hardin v. Jordan*, 140 U. S. 371 (11 Sup. Ct. Rep. 808), uses the following pointed language:

"It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted; no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of said waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title

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of the grantee to such meander lines. It has frequently been held, both by the federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered, and that the waters themselves constitute the real boundary. *Railroad Co. v. Shurmeir*, 7 Wall. 272, and other cases. . . . It has never been held that the lands under water in front of such grants are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of waters. With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery, and cannot be retained or granted out to individuals by the United States.”

In view of such authoritative language, in every event, it would require the most explicit and unmistakable words in an act of congress to cause a court to construe any grant upon tide water to extend beyond high water mark, even though its date were within territorial times, and there were no argument to be made upon the theory of a trust imposed upon the general government for the benefit of the future state. Whatever the theory may be, the fact is that the government never intended to have any grant under its public or private land laws construed to include the soil beneath the waters, and all of its grants are fully and justly satisfied by making them apply to the land, and not to the water.

3. We are urged to consider that this tract is not covered by water navigable in fact, because it is uncovered at

low tide, though it is conceded that the ordinary high tide does cover it, and that the ordinary high water mark is between it and the upland. But the rule is a fixed one that high water mark is the limit of government grants; therefore it can make no difference whether at low tide the area exposed is great or little, or whether the fluctuation of the waters is as great as in the Bay of Fundy, or as slight as at St. Augustine. The high tide is the boundary beyond which there is no land to be granted.

4. Another suggestion is that at various points, some of them within this state, the patents of the government do purport to cover tracts below high water mark; showing the action of the land department in that particular. It may be that there are such patents. The convenience of surveyors may have led them to show meander lines on their plats which do not exactly accord with the sinuosities of the shore; but they are probably errors coming within the maxim *de minimis non curat lex*. If they are more, the answer is that the practice of the land officers in a few cases does not make the law. Such cases are mere mistakes on the part of the government's agents.

5. It is contended that in *San Francisco Savings Union v. Irwin*, 11 Sawy. 667 (28 Fed. Rep. 709), it was held that the title of the State of California to submerged tide flats capable of reclamation by embankments was not based upon her sovereignty, but solely upon the act of 1850 (9 St. at Large, 519), granting swamp and overflowed lands within their borders to the states. But, although the brief asserts that the land in the case of *Savings Union v. Irwin* and that in the case at bar were identical in character, we do not so understand the fact to be. In the former case the controversy was over the possession of "overflowed" lands lying in front of Mare Island, which were sometimes called "tule" or "marsh" lands. They were lands over which the high monthly tides flowed, but not the ordinary daily

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tides, and between the island and portions of them there were navigable sloughs. They were more or less covered with vegetation, and were in no sense the bottom of the sea or river. Moreover, the real controversy there was whether a Mexican grant, followed by a United States patent, for "Mare Island, bounded by the water's edge," authorized a subsequent grantee to convey the island, "including all the tule or low and marsh land belonging to the same, or which has ever been reputed or claimed to belong to the same," which the court settled in the negative, citing *United States v. Pacheco*, 2 Wall. 589. It is currently reported that there are thousands of acres of lands in this state of the general character of the lands in the Mare Island case, much of which has been patented by the United States, and is now under a high state of cultivation. But they are not such lands as the daily tides of Elliott Bay cover. They are tide-marsh or prairie lands, composed of alluvial soil, where the interference of the extreme tides or high water caused by wind currents does not prevent a natural growth of vegetation.

6. Lastly, the constitution of this state is appealed to, to show that there is no objection from that source to the appellant's claim. Sec. 2, art. 17 of the constitution declares that "the State of Washington disclaims all title in and claim to all tide, swamp and overflowed lands patented by the United States: *Provided*, The same is not impeached for fraud." There was no occasion for mentioning swamp and overflowed lands, since they were expressly withheld from the state by the enabling act, § 17. Whether the section amounts to a recognition or confirmation of such patents or not, as claimed by appellant, need not be determined. The language is, "disclaims all title." The state merely asserts nothing. But appellant claims that his attempted location of scrip a few days before the constitution went into effect entitles him to share in the disclaimer, since

he may get a patent which will relate to the date of his location. This position in some cases might require a decision of what is meant by "patented" in the section quoted, but it is not necessary here. We have seen from the highest judicial authority that the United States never would, if it could, patent this tract or recognize appellant's claim to it, unless through the mistake of its officers; and no such impossible case was contemplated by the constitution.

The judgment of the superior court is affirmed.

ANDERS, C. J., and SCOTT, DUNBAR, and HOYT, JJ.,  
concur.

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[No. 195. Decided August 1, 1891.]

HIRAM N. MUZZY v. LUCY A. TOMPKINSON.

EQUITY PLEADING — CANCELLATION OF DEED — WANT OF CONSIDERATION — MEASURE OF DAMAGES.

In an action by a daughter to set aside a deed executed to her father on the ground of want of consideration and false representations as to the nature of the conveyance, the complaint showed the relation of the parties and the defective mental and business character of the plaintiff; that the father, while the relation of trust and confidence existed between him and his daughter, and with knowledge of plaintiff's inexperience, procured her to sign a certain writing without paying any consideration therefor; that this writing was a deed to defendant, and that he represented it to be a mortgage. *Held*, That the *gravamen* of the action depends as much upon the allegation of want of consideration as upon that of fraudulent representation, and that proof of want of consideration will entitle plaintiff to relief although she may fail to sustain the allegations of fraudulent representation.

In such an action, judgment for plaintiff is justified, when the evidence shows that a mortgage and certain deeds were executed by plaintiff by the direction of the defendant; that she did not know the purport and effect of the same; that the same were executed without any consideration moving to her; that no attempt was made by any one to explain to her the purport and effect of said

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instruments; that she was of defective mental capacity and inexperienced in business; and that she was living with her father, wholly under his influence, and accustomed to rely implicitly on his advice and obey his instructions.

In such an action, where defendant has, in good faith, conveyed away a portion of the land fraudulently acquired, without any purpose to place it beyond the reach of plaintiff, the proper measure of damages for the land thus disposed of is its value at the time of its conveyance.

The supreme court will not render judgment against the sureties on an appeal bond, under Code 1891, § 1432, where the bond secures to appellee the payment of all rents or damages to property during the pendency of the appeal, unless such damages can be known without an issue and trial. (Opinion on rehearing.)

*Appeal from Superior Court, Spokane County.*

The facts are fully stated in the opinion.

*Turner & Graves*, and *G. G. Ames*, for appellant.

*Nash & Wakefield*, for appellee.

The opinion of the court was delivered by

STILES, J.—The parties to this action were father and daughter. The appellant, Muzzy, about 1880, settled himself and family on government land on the opposite side of Spokane river from the then village of Spokane Falls. His family consisted of himself, his invalid wife, and five children, all of whom were of mature years. His other children had from time to time either married or left home for the purpose of maintaining themselves. The respondent was then about twenty-five years of age, and a single woman. In intelligence she was rather below the average, and had had slight advantages of education, and little or no business experience. It was contended in her behalf at the trial of the cause that she was mentally incompetent, but we think, upon the whole, that it fairly appears from the record that there was no unusual weakness of intellect, but that lack of education was about all

that would characterize her as different from ordinary women in her position in life. Her family were then poor and she had been accustomed to doing the housework of the family. A somewhat unusual corpulency and shyness resulting therefrom seem to have rendered it probable that she would never marry. It is clear that for her entire support she then relied, and always expected to rely, upon her father. In return therefor she was content to remain at home, nursing her sick mother, and doing the household work, leaving all matters of business wherein she had any interest to be attended to by her father.

The appellant, soon after arriving in Washington, conceived great confidence in the future of Spokane Falls, and proceeded to acquire a body of land in that neighborhood, by exercising his homestead rights. He also caused the respondent to locate herself as a homesteader upon the land in question, in the fall of 1882. Her sister also located upon an adjoining quarter section. It is agreed by all parties that the lands entered upon consisted of a gravelly plain that was of practically little or no value for any purpose excepting as it might depend upon the future development of the village near the falls. The nature of the soil rendered it totally unfit for cultivation. The appellant chose to acquire his own tract by residence thereon during the full term of five years; but in the spring of 1883, after having built for his daughter a fence around her tract, and a small house in which she kept up the necessary residence for about six months, he advised her to commute her homestead to a cash entry, and by so doing avoid the further necessity of living on the land. She had no means whatever with which to pay either the office fees, the cost of the improvements made upon her tract, or the sum of \$400, which was the government price for the land. She stated, without contradiction, that in consideration of the improvements her father was to have the "back forty,"



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and when the question of means with which to pay for her land came up her father suggested that she mortgage the place to secure it. At the same time her father was in need of money, and they joined in making a note to one Ollis for the sum of \$1,500, which was secured by her giving a mortgage to Ollis for that amount on her tract. The money being thus procured, \$400 of it was used to pay the government, and the remainder of it went to appellant's use. This mortgage was made by respondent against the advice of at least one of her brothers, who maintained that she should not thus burden her land for the sake of assisting her father, and that she ought to procure only the actual sum which she needed. She desired, however, to assist her father, and relied entirely upon his promise to see that the loan was repaid and the mortgage canceled. She made her final proof in December, 1883, and in May, 1884, obtained her patent. This mortgage was satisfied on the 22d day of May, 1886, and on the 24th day of the same month, at the suggestion of her father, she executed another mortgage to one Jennison on the same land, for the sum of \$1,200, the note being signed by herself and her father. On the 8th day of March, 1886, at the instance of her father, she executed a deed to one Turner, by which she conveyed forty acres of her tract in consideration of \$1,500. And on the 14th day of June following, also at her father's suggestion, she executed a deed to one Abernethy for another forty acres of her land, for a like consideration of \$1,500. These two sums of \$1,500 were paid to her father in money by her grantees, and the amounts were retained by him. On the 15th day of June, 1886, for the expressed consideration of \$1,000, she executed a deed to her father for the remaining eighty acres of her land. This \$1,000 was not paid to her then, or at any other time, nor did she ever receive any portion of the \$3,000 derived from Turner and Abernethy. From the time of the execution of the last-

named deed until this action was commenced on the 16th day of December, 1889, the appellant has, therefore, been the legal owner of the eighty acres conveyed to him, with the exception that on the 10th day of September, 1887, he conveyed to the Spokane College a tract of about fifteen acres, for which he received no substantial consideration, the conveyance being in the nature of a donation to that institution. The respondent now brings her suit to set aside the deed executed by her to her father for the eighty acres, with the exception of that portion of it conveyed to the Spokane College, and prays judgment against him for the \$3,000 paid by Turner and Abernethy, and for the value of the fifteen acres and upwards conveyed to the college.

The complaint set forth that up to the 15th day of June, 1886, since her patent, respondent was the owner of the tract. She alleged the relationship between herself and her father; that she was at all times since 1882 ignorant and wholly inexperienced in all matters of a business nature, and was accustomed to rely upon her father therein, and that he knew that she was deficient in mental capacity and understanding, and wholly incompetent to transact anything of a business character requiring thought and consideration; that she was induced to settle upon and commute her tract by her father; that at her father's instance she had assisted him in borrowing the sums of money before mentioned, and that he had stated to her that to secure her for the repayment of the sums borrowed for his benefit, he would give her a certain timber culture claim that he then held; and then followed this form of allegation: "4. That on the 15th day of June, 1886, defendant, fraudulently taking advantage of plaintiff's said incapacity, of which defendant well knew, and of her implicit confidence and reliance in him on account of the close relation existing between them, procured her to sign a certain writing,

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without paying any consideration therefor, and which writing defendant falsely and fraudulently represented to be a mortgage on said above described premises, to secure the payment of the aforesaid sum of twenty-six hundred dollars. 5. That plaintiff is informed and believes that the said writing is under seal, and is a deed of said premises, and conveys the same, or some interest therein, to the defendant, and that he intends to use the same for his own benefit and to the prejudice of plaintiff, and that defendant has continually assured her ever since the making thereof that she had only executed a mortgage; that it was not until about one year thereafter that she was informed that instead of executing a mortgage she had executed a deed of said lands to her father; and plaintiff further avers that when she asked her father, the defendant, about it, he assured her that it was all right, that she should have her property free and unencumbered, and that he would attend to the matter and see that everything was correct in respect thereof, and that he has repeatedly since that time assured her in most positive terms that her property was in no way encumbered excepting as aforesaid, and that he would see that the matter was all right; that by these false representations and assurances defendant sought to and did lull plaintiff into a sense of security concerning the same, and not until within the past six months has she become convinced that it is his intention to claim the same as his own property, and to swindle and defraud her out of the same, and that he claims said property in fee simple by virtue of a deed executed by plaintiff, and that thereupon she took steps to examine into the matter," etc., with the result that she ascertained the deed to be of record in the office of the auditor of Spokane county. Then follows an allegation of the existence of the deeds to Turner and Abernethy, after which she alleges:

"7. That said defendant, her father, taking advantage

of the confidence reposed in him by her, and of her total incapacity to transact business, and by fraud and misrepresentations, induced her to sign the papers and deeds as aforesaid, and received the considerations arising therefrom, and that she would not have signed and executed the same had she known their true meaning and effect, but that she did not know of the fraud that had been practiced upon her until about ten days ago, and when she was advised by her counsel in regard thereto."

There are also proper allegations as to the conveyance of the tract to the Spokane College. The answer contained a denial of those parts of the complaint which alleged plaintiff to be deficient in mental capacity, and her reliance upon her father, and the charges of misrepresentation and deceit, and set forth that the actual exchange made between the parties was on the 17th day of March, 1884, in this language:

"2. Defendant further alleges that on the 17th day of March, 1884, he purchased said real estate of plaintiff, and in payment therefor assumed the whole of said Ollis mortgage, and conveyed to her a one hundred and sixty acre timber culture claim in Lincoln county, in said state, of the value of about one thousand dollars.

"3. That said property at that time was of the value of not to exceed fifteen hundred dollars, and the consideration thus paid plaintiff by defendant for said real estate was full, fair and ample.

"4. At the time of making said trade plaintiff consulted with her brothers and sisters and other of her friends fully concerning the same, and she knew exactly what she was doing, was as competent as any one to do such business, and was not in any way imposed upon or overreached.

"5. That for convenience the title to said property was left at the time in plaintiff, and remained in her until she conveyed the same as hereinafter alleged.

"6. That thereafter she conveyed portions of said land, as alleged in said complaint, to Turner and Abernethy and to defendant by good and sufficient deeds, and with full and entire knowledge of what she was doing. Such con-

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veyances were made by her under the provisions of her sale to defendant, as aforesaid, and in furtherance thereof, and not otherwise.”

In the trial of the cause the plaintiff introduced witnesses who testified as to her want of capacity to transact business, and as to the relations of trust and confidence which existed between her and her father. Certain of this testimony went so far as to make her appear to be even weak-minded or childish. Other witnesses testified that in 1884, at the time when the defendant claimed the transaction between himself and his daughter to have taken place, the land conveyed to him was worth from \$40 to \$50 an acre. The plaintiff herself then became a witness, and proceeded to make a very poor narration of the transactions of which she complains, in the progress of which it appeared, however, that each step taken by her was under the advice and substantially at the dictation of her father. In almost any other cause she would have been an exceptionally bad witness because of the few particulars she was able to give of the transactions in issue. But she maintained without any subsequent contradiction that she had never received any money from her father as the proceeds of any sale of her lands; and while she did not narrate clearly the circumstances attending the execution of any one of the instruments actually executed by her, she maintained stoutly that each time she was assured by her father that what she was about to do was merely in the way of assisting him, and taking care of the mortgage obligation which she had originally incurred as it was continued from time to time by her subsequent obligations. But although she would ordinarily have been a bad witness, as has been said, perhaps in this kind of a case she may be accorded justly the praise of having been an exceptionally good witness. She betrayed no intention either to obscure or pervert any of the facts about which she was inquired of, but seemed to

be honestly ignorant of substantially the whole matter. This closed the case of the plaintiff. For the defendant numerous witnesses testified that this land, in March, 1884, was of little or no value outside of its dependence upon and connection with Spokane Falls, but was a possible source of great profit in the future, in the minds of those who had faith in the outcome of that town. In 1886, however, when this conveyance was actually made, it was conceded that the value of the property had greatly advanced, so that the prices paid by Turner and Abernethy were no more than the market value of the tracts purchased by them. It was also shown that the plaintiff's mental qualifications were much better than they appeared to be from the testimony on her behalf, it being conceded, however, that her reliance upon her father, even at her then advanced age of upwards of thirty years, was, as it had always been, complete and unreserved. Defendant made no attempt to sustain his allegation that at the time of making his alleged trade with plaintiff she consulted with her brothers and sisters and other of her friends concerning the same; and in fact it appeared that several members of the family knew nothing of it until some time after it had transpired, and that his daughter had absolutely no counsel or advice from any person excepting himself. When a mortgage or deed was to be made by her, all consultation with third persons was by him, and she was not spoken to in regard to the matter until the document had been prepared, and was ready to be placed before her for signature. It did not appear that any of the instruments signed by her were ever read to or by her. In several instances an instrument, having been drawn by her father, was given to her, and she was told to take it down to the notary's for acknowledgment, which she did without any word of objection. Defendant showed by several witnesses that at various times subsequent to the execution of the

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deed to him his daughter, in conversation with other persons, had alluded to her land, and stated that she had traded it to her father for a timber culture claim; that she was sorry she had done so, as she had made a bad bargain, but that it was all right, as she had got all it was worth at the time. She also seemed to have a great contempt for the "gravel," as she designated her land, did not think Spokane would amount to much, and was glad she had got rid of it.

Concerning the transaction with the timber culture claim, the facts appeared to be these: That appellant had taken up 160 acres in Lincoln county, some distance from Spokane, as a timber culture claim under the United States land laws; that he had plowed ten acres and put a wire fence around it; that at the time of his alleged transfer of it to his daughter he had made no other improvements upon it, and had planted no trees; that it was fairly good land, which, when title had been obtained to it, would have been worth from \$4 to \$6 per acre; that his daughter had never seen it; and that at the time of his alleged transfer to her, in 1884, the time allowed him by law to hold the claim was then about twenty days from expiration, unless he should before that time further improve it in compliance with the law. It seems, however, that he had actually not complied with the law, in that he had not cultivated or cropped any portion of the land as required by the statute, although he had plowed five acres in each of the two preceding years, and had, therefore, a very doubtful right to further hold the land at all. He claimed this right to be worth \$1,000, and insisted that because of his relinquishment of it to his daughter, and the assumption of the \$1,500 mortgage to Ollis, he had actually given her the value of \$1,900 for her land, the items being: For the timber culture, \$1,000; for the improvements put upon her land by him, \$500; and \$400 loaned her for the purchase of her land. At any rate, he

relinquished the land to her, and she filed a similar timber culture claim upon it. Her brother plowed five acres for her the first year. Then, at her father's suggestion, she relinquished her claim to this brother; whereupon he filed a like claim upon the same land, and, after holding it for another year, relinquished it again to another sister, who was holding it at the time of the trial. It appeared that this brother and sister acknowledged at all times that they held this land for the benefit of the plaintiff; that is, that whenever anything could be derived from it, or whenever the title to the land should be acquired, as the case might be, the land or the money should go to the plaintiff. But there was a significant fact in that connection, to wit, that the father never lost control over it. It was even said by some of the witnesses, though denied by him, that he had remarked that "they would hold that timber culture claim as long as there were children in the Muzzy family." Subsequent to plaintiff's marriage, which occurred about 1887, she and her husband, being very poor, desired to realize something from the sale of this timber culture claim. Her father at that time had a cash offer for the same from some one, and they urged him to sell it; that is, respondent urged him to sell what he maintains was her property, so that she could have the proceeds of it. This is what appellant says in regard to that:

"Tompkinson and his wife asked me frequently to sell it. Mr. Tompkinson was at my house several times last year, and requested me, and his wife requested me, to sell it and get the money out of it. I had an offer of seven hundred dollars in cash for the claim, but I would not take that. He said he wanted the money out of it."

Certainly nothing more conclusive could appear out of the mouth of witnesses than that, whatever may have been the other facts in connection with this case, appellant had never released or intended to release his practical hold upon that timber culture claim, and was simply using his chil-



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dren as a means of acquiring the land, or of holding it for speculative purposes for his own use. At the time of his relinquishment to appellee, even though his rights had been in full preservation, the transfer was in a manner thrust upon plaintiff. She had never seen the land, and she had no ability or means, either present or prospective, to carry on the necessary improvements through the period of eight years during which she would have no title, and nothing else but a speculative chance of sale. The appellant was an able business man, and in the closest possible relations of confidence with his daughter known to the law; yet he gave no word of statement or explanation to her concerning that which he assumed to give her as an equivalent for the perfect title which she possessed. At the most, therefore, all that appellee can be said to have received for her 160 acres of land was the cost of the improvements placed upon it by her father and the money used in paying the government for it. Now, it is undisputed that before she ever had title to it appellant had agreed that one forty-acre tract was to be received by him as an equivalent for his improvements. This shows his own appreciation, even as early as 1882, of the value of the land, and would have left the actual burden on 120 acres of only \$400. We use this as an illustration merely, since it may be argued that any contract or promise of the appellee to give a portion of her land to her father was void under the law under which she acquired it.

We shall go no further in stating the testimony in this case, excepting to remark that from the whole case it appears with a great degree of probability that the appellant, who had conceived a very strong confidence in the future of Spokane, and was eagerly acquiring title to all the land he could get in that vicinity, and who at all times, when remonstrated with by the members of his family for the manner in which he was treating his daughter, answered

that "she was indebted to him for getting the land in the first place," really regarded himself as in a manner entitled to the land, as though considering his daughter as only the means by which he had been able to procure the title from the government, forgetting that any such view of the case was utterly inadmissible, especially in consideration of the terms upon which the government parts with its lands, and the prohibition which is laid upon every one against the taking of land for the benefit of another. We are therefore laying out of the question all testimony which was taken on the rebuttal, and all the possible errors which the court below may have made in admitting evidence on the part of the plaintiff, which, if admitted at all, should have been introduced as a part of her case in chief, and upon the admission of which the appellant seriously complains.

We return now to the pleadings and the findings of the court below. It was contended by the appellant, with a great deal of force and earnestness, that the complaint, stripped of all verbiage, based the plaintiff's right of action upon actual fraud, accomplished by the false representations made to her, that the instrument which she signed, and which conveyed her property to appellant, was a mortgage, and not a deed; and that, inasmuch as the court below found that allegation to be not sustained, its judgment should have been for appellant instead of respondent. It was not contended that this court is bound in any manner by the findings of a superior court, or that this is a case merely for affirmance or reversal, but it was urged that in the interest of good pleading this court should find the fact to be as found by the court below, that the misrepresentations did not exist, and that we ought thereupon to dismiss the cause, regardless of any other equity shown by the evidence. The respondent concedes the failure to prove the misrepresentation, and lays aside that allegation.

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Indeed, it seems quite unlikely that the appellant would have resorted to any such means to induce his daughter to part with her title in view of the fact that she appears at no time to have been suspicious of her father; and it is altogether probable that, had he requested her to convey the property to him outright merely upon the assurance that it would be better for her to do so, she would have done so without much persuasion or any further reason. We do not think that the evidence discloses on the part of the appellant any design at the time the deed was executed to swindle or defraud his daughter, but consider rather, upon the whole case, that he looked upon this land as in a sense property of the family, of which he was the head, which he had the best right to dispose of as he saw fit, without giving his daughter any reason for his actions. On the other hand, we think it equally probable that the statement of respondent that it was only mortgages that were spoken of to her was made in good faith, and to the best of her recollection at the time, since the testimony shows that it was concerning the mortgages, in the first place, that she was consulted with, and that there was advice given to her by other members of the family, and that, when it came to the transfer of her land to Turner, Abernethy and her father, there was little or no discussion in her presence, no consultation with her, no advice given to her, and that she was a party to no negotiations or any other step in the matter of the transfers excepting the mere execution of the deeds, which she immediately handed to her father.

This leaves the case to be decided upon whatever else there is in it of proof responsive to the allegations of the complaint; and we think we are justified in saying that a critical examination of the fourth paragraph of the complaint makes the *gravamen* of the action to depend as much upon the allegation of want of consideration as that of fraudulent representation. Preceding portions of the com-

plaint, by way of inducement, showed the relation of the parties, and the mental and business character of the plaintiff; and in this fourth paragraph the substantial fact is stated that the father, while the relation of trust and confidence existed between him and his daughter, and with knowledge of plaintiff's inexperience, procured her to sign a certain writing without paying any consideration therefor. Other portions of the complaint showed that this writing was a deed, and that the defendant represented it to be a mortgage, which it was not. It is not stated only that the appellant *by* the misrepresentation procured the deed, or that without the misrepresentation the deed would not have been made. The facts are pleaded: (1) The confidential relation; (2) that there was no consideration; (3) that there was misrepresentation. This is what the code requires, and it was proper to state the facts *seriatim*, as they occurred. In a case of this kind there can be but one cause of action, embracing all the ultimate facts connected with the transaction, and upon them the court of equity grants or refuses relief. If the pleader omits facts which exist to his knowledge, which would entitle him to relief on the ground of constructive fraud, and stands upon other facts which constitute actual fraud only, he is bound by his pleading, both in the reception of evidence and in the disposition of the case, unless he amends in time. But the statement of facts which support actual fraud does not establish the case as one based on that theory alone, if there are other ultimate facts as clearly alleged in the pleading which would support the theory of constructive fraud, whether with or without the additional allegations of actual fraud. The case of *Eyre v. Potter*, 15 How. 42, was relied upon to sustain the appellant's contention on this point. That was a bill in chancery in the United States circuit court of North Carolina, and was framed under the

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common-law rules of equity pleading. One of the defendants was step-son of the complainant, but the court said:

“The defendants in this case were clothed with no special function, no trust which they were bound to guard or to fulfill for the benefit of the complainant. They were not even the depositaries of any peculiar facts or information as to the subject-matter of their transactions, or which were not accessible to all the world, and by an omission or failure in the disclosure of which they could be regarded as perpetrating a fraud.”

The bill alleged a combination between the defendants to defraud her by attacking her in the midst of her sorrow for her deceased husband, and by false representations as to the condition of her estate, but alleged the existence of no confidential relation, and merely claimed inadequacy of consideration. The court said the bill could not be considered as stating a case of constructive fraud arising out of some peculiar relation of the parties, but as one of actual, positive fraud, which could not be varied by the establishment of facts sufficient to create a case under a totally distinct head of equity. The opinion was, moreover, pronounced in view of evidence which totally failed to disclose any merit in the complainant's cause. We think this case and that of *Eyre v. Potter* have little, if anything, in common which should make the latter an authority on the point in discussion.

The appellant's next point is, that no presumption of invalidity in a transaction between parent and child which throws the burden upon a parent of showing that the transaction was fair and just, and that the child was fully advised of its rights and interests, arises merely from proof of the relation of the parties. There can be no objection to that statement as made. Nor can there be as to the next one, viz.: That in the adjudged cases there was always some circumstance of actual undue influence, inadequacy of con-

sideration, or other inequitable incident moving the court to action. A child who has attained majority is not a ward of his father, so that their relation is *per se* fiduciary. Nor is their relation necessarily confidential, though doubtless it usually is so, for some time at least, after the majority. We think it will be found that every such case depends upon its peculiar facts. To merely state some of them at once impresses the mind that wrong has been done; for example, *Miller v. Simonds*, 72 Mo. 669, where a young lady, just of age, and still under parental influence, at the instance of her brother conveyed her whole estate to her father just before her marriage; so *Taylor v. Taylor*, 8 How. 183. *Jenkins v. Pye*, 12 Pet. 241, is high authority that a deed from a child to a parent is not *prima facie* void as against public policy. The criticisms upon that case scarcely seem to be just, when the bare point decided is considered. To have held otherwise in that case would have done rank injustice, since no complaint was made for twenty years, and until both parties to the deed were dead. But, conceding all these positions, what have we here? No intention of the respondent to confer a bounty or gift upon her father, no family settlement, but an alleged sale for an alleged consideration of \$1,900, before the full consummation of which \$3,000 had been received by the grantee for half the property conveyed; \$1,000 of the alleged consideration a worthless "claim," and the balance a pre-existing debt; and all this accomplished without advice from or consultation with any person other than the appellant. In *Jenkins v. Pye* the court said, speaking of some English cases, and of the "ingredient" of undue influence found in them all:

"In some cases, although there may be circumstances tending in some small degree to show undue influence, yet, if the agreement appears reasonable, it has been considered enough to outweigh light circumstances, so as not to affect the validity of the deed."

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If we seek undue influence in this case, it is easily found. It appeared when the first mortgage was given, and was not wanting upon each occasion when the appellant, without previous consultation with his daughter, himself prepared and presented to her for signature conveyances of her property, without so much as an invitation to read the document or hear it read. His request was her law in the matter, and he must have known it, or he would have taken the trouble to explain it to her. Of reasonableness in this arrangement there was none, unless it be considered reasonable in every case for a father to take from his child her real estate without consideration, she being competent to take care of it herself.

The tenth finding of the court below was that the second mortgage and the three deeds above described were executed by plaintiff by the direction of the defendant; that she did not know the purport of the same, and consequently the effect of the same; that the same were executed without any consideration moving to her; that no attempt was made by the defendant, or any one else, to explain to her the purport and effect of the execution of said instruments; and that, considering her defective mental capacity, inexperience in business, the circumstances under which she was living, and the influence of defendant, her father, over her, it was a fraud to procure her to execute said instruments without having their purpose and effect fully explained to her. These findings fairly present the result of our investigation, and justify the judgment of the court below; for, whatever may be said of the complaint, it is certain to our mind that the gist of the action was not that the plaintiff had lost her property by being deceived by defendant, but that she had in her trust and confidence in him, without sufficient reflection upon the effect of her act, conveyed to him everything she had without any valid

consideration. In such a case equity pays very little attention to whether the property conveyed was of great or little value, nor does it stop to weigh with great nicety all the possible claims which either party may have by reason of the other party not being able to replace him in the precise position he occupied when the transaction occurred.

The action, we think, was brought in time.

The court below set aside the deed to the appellant as to all the land conveyed to him, with the exception of that part conveyed by him to the Spokane College. For the fifteen acres and upwards conveyed to the college the court rendered judgment against appellant for \$5,421.15, being at the rate of \$350 per acre, which was the value agreed upon by the parties as the true value at the date when it was parted with by appellant on the 10th day of December, 1887. Respondent appealed from this part of the judgment, claiming that the correct measure of damages was not the value at the time of the transfer, but at the date when the suit was brought. The rule adopted by the court was the correct one in this case. It was not contended nor proven that the conveyance to the Spokane College was made in bad faith by the appellant, or with any purpose to place it beyond the reach of the appellee. In this it is clearly distinguished from the cases cited on that point by the appellee, all of which had in them some element of *mala fides*. The court also allowed judgment against appellant for \$3,000 received from Turner and Abernethy. The sums thus allowed by the court we think should have been reduced by the sum of \$900, with interest thereon from December 17, 1883. This sum represented the value of the improvements put upon appellee's land by her father, \$500, and the sum of \$400, the government price of the land.



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The cause will be remanded to the court below for modification in accordance with this opinion, and, when so modified, will stand as the final judgment.

HOYT and DUNBAR, JJ., concur.

ON PETITION FOR REHEARING.

STILES, J. — With the main decision in this case we continue satisfied, for the reasons therein given. But in the petition for rehearing the appellant, Muzzy, earnestly endeavors to obtain a change in our holding in the matter of the \$5,421.15 allowed for the land conveyed to Spokane College.

As will be observed, we sustained the rule adopted by the superior court, viz.: That the measure of recovery proper under the facts was the value of the land at the date of the conveyance to the college, and not at the date of the commencement of the action. The appellant, Muzzy, appealed on the whole case, and the appellee, Tompkinson, appealed from this part of the decree, she claiming that at the latter date the property was greatly more valuable than at the former one.

At the hearing the time of counsel for argument was greatly extended, but neither side reached this subject, but left it to the decision of the court on their briefs.

Our decision was against the appellee in this particular, and from the briefs of the appellant we obtained the impression that if the main case were decided against him he was satisfied with the judgment for the value of the college land. Upon this point the brief said:

“We think if the court erred in that matter it erred against the appellant, and not against the appellee.”

And again:

“No reason can be conceived why the rule of damages in a case of this kind should be more onerous than in trespass and conversion, yet in those cases the rule is universal

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[2 Wash.]

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that the measure of damages is the value of the article at the time it was taken or converted, with legal interest from that date."

Now, however, it is urged that there should have been no recovery at all against appellant for the college land, but that, inasmuch as the Spokane College took the land as a gift, and was, therefore, not a purchaser for value, it should have been made a party defendant, and the trust should have been impressed upon its land to the relief of Muzzy. If it were true that the conveyance to the college was without consideration, perhaps the position of the appellant would be sound. But let us see how the facts stand.

The complaint alleged that the appellant had conveyed certain land to the college, and that its value was thirty thousand dollars, and the answer did not deny either of these allegations. The testimony was all taken so that both sides rested, and the cause was set for argument June 16, 1890, without a word being said upon either side as to the college land. On December 30, 1890, however, upon the plaintiff's motion, the court allowed her to take testimony as to the value of this land, and to introduce the deed to the college. On January 3, 1891, the testimony was taken, the court excluding all inquiry as to the value at the time the action was commenced, but allowing the value at the date of the deed to be shown. At the conclusion of the testimony both parties stipulated the value at the date of the deed to have been \$350 per acre. Then the deed was introduced, which expresses a consideration of "one dollar, and other good and valuable considerations," and, after describing the tract conveyed, contains the following:

"It is expressly agreed by and between the parties to this instrument that the tract of land last above described is to be platted by the party of the second part, its successors or assigns, in accordance with the general plan

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adopted by said party of the first part in the platting of the addition above mentioned (Muzzy's addition to Spokane Falls), to the end that all streets shall be of the same width as those in the above named addition, and continuation of the same. It is intended to convey eight blocks of land exclusive of streets."

Now, with no plea of a defect of parties, and not a word further said in the case about this land, how can we say that there was no consideration for the deed, or that the Spokane College, when the action was commenced, still held any portion of the tract?

But were it to appear clearly that the conveyance in question was not such as to vest the title in the college as a *bona fide* purchaser, it would be still a subject for discussion whether the *cestui que trust* could not elect either to follow the property into the hands of the voluntary grantee or to obtain in equity the proceeds of the conveyance or the value of the property from the trustee. *Lathrop v. Bampton*, 31 Cal. 17 (89 Am. Dec. 141); *Bradley v. Luce*, 99 Ill. 234; *Long v. Fox*, 100 Ill. 43.

Being satisfied with the correctness of the decision heretofore made, the petition for rehearing will be denied.

Appellant moves this court to render judgment against appellant's sureties on his appeal bond. The statute (Code of 1891, § 1432) provides that the supreme court may render such a judgment for the amount of the judgment, damages and costs referred to in the bond, in case such damages can be accurately known to the court without an issue and trial. But in this case the bond secures to the appellee the payment of all rents or damages to property during the pendency of the appeal out of the possession of which she is kept by reason of the appeal, and as such damages cannot be known without an issue and trial, the motion is denied.

HOYT and DUNBAR, JJ., concur.

[No. 196. Decided August 1, 1891.]

CHARLES MCSORLEY AND ELLEN MCSORLEY V. ALICE  
S. HILL, *Executrix of the Last Will and Testament of  
William C. Hill, Deceased.*

PUBLIC LANDS — DONATION CLAIMS — DIVORCE — REGISTER'S CERTIFICATE — VESTED RIGHTS — INNOCENT PURCHASER — PORTERFIELD WARRANTS — LOCATION — ASSIGNMENT.

Where a married man became a resident of the Territory of Oregon prior to December 1, 1850, and settled on 640 acres of land in April, 1852, claiming same under the act of congress, Sept. 27, 1850 (9 U. S. St. at Large, ch. 76, p. 497), his divorce in December, 1852, reduces his rights under said act to those of a single man, and his subsequent marriage in 1853 will not put him in a position to claim more than 320 acres.

Section 5 of the act of February 14, 1853 (10 U. S. St. at Large, 158), amendatory of the act of September 27, 1850, merely extends the time within which persons may acquire title under the donation act, and does not change the qualifications of the applicant thereunder.

The fact that the register of the local land office issued a certificate to a man and his wife entitling them to 640 acres under the donation law, gives them no vested right in said land where the commissioner of the general land office, under the discretion vested in him by § 7 of said act, reverses the action of the local officers.

Where such parties, having no vested rights in the land, and before the issue to them of a donation certificate therefor, convey said land to another, their grantees cannot be considered an innocent purchaser for value.

Under the act of congress, April 11, 1860, for the "relief of the legal representatives of Charles Porterfield, deceased," Porterfield warrants may be located upon lands which are occupied under an invalid entry.

The act of congress, March 22, 1852, § 1, providing "that all warrants for military bounty lands which have been or may hereafter be issued under any law of the United States, are hereby declared assignable," applies to the Porterfield warrants.

Where rights have been acquired under the construction of the executive department allowing Porterfield warrants to be located upon unoffered land, such rights will not be disturbed when it does

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not clearly appear from the act of congress that it contemplated restricting such locations to lands that were subject to private entry.

*Appeal from Superior Court, King County.*

Action by Alice S. Hill, executrix of William C. Hill, against Charles and Ellen McSorley, for possession of real estate.

In April, 1852, one D. S. Maynard, under the act of September 27, 1850, commonly known as the "Oregon donation law," made settlement upon a tract of 640 acres of land in King county, as a donation claim. Maynard had taken up his residence in Oregon in September, 1850, and in April, 1853, he filed in the office of the register and receiver at Olympia his notification No. 407, claiming this 640 acres of land as a donation claim, one-half for himself and one-half for his wife, Catherine T. Maynard; continued his residence upon the land; complied with the law in respect to cultivation; and made his proof as required by the act. After his term of residence was completed, but before the land office had issued any certificate to him for the land, in 1867, Maynard and his wife, Catherine T., executed a deed of the land in dispute, for a valuable consideration, to Hugh McAleer. In 1869, two years after this deed was recorded, and after McAleer had taken possession of the land, the local land office issued a certificate, as provided by § 7 of the donation act, to David S. Maynard and Catherine T., for the tract of land in question, the west half to the husband and the east half to the wife. The east half embraces all the land now in litigation. In 1871 the general land office reversed the action of the local land office in giving the east half to Catherine T., and found that it belonged to a former wife of D. S. Maynard, Lydia A., whom he married in 1828, and from whom he was divorced on the 24th day of December, 1852, by the legislature of Oregon. On the 15th day of January,

1853, he was married to Catherine T. The secretary of the interior, upon appeal, rejected the claim of both wives, and ordered the patent for the west half to issue to Maynard as a single man, which was done. Between the year 1875, when this final action was taken by the department, and the year 1880, divers claims were made to this land, none of which were held valid by the department. On the 8th day of January, 1880, W. C. Hill, party to these suits, and one J. Vance Lewis, made application at the local land office to locate Porterfield warrants upon this land, which application was rejected, but upon appeal was allowed. Eleven months after this application, viz., on December 16, 1880, Hugh McAleer, having lived since 1867 upon the land, offered a homestead application, which was rejected by the local land officers, whose action, upon appeal, was sustained. McAleer, however, had made a prior homestead application on April 1, 1880, which was rejected by the local land office, and from which no appeal was taken. McAleer, so far as the proof shows, was a foreigner, having never completed his naturalization. Certain of the heirs of Hugh McAleer are in possession of a portion of this land. Lewis' and Hill's entries under the Porterfield warrants were allowed, and patents duly issued to them. Lewis and wife conveyed their interest to Hill, who holds the legal title to the land, and brings suit against McSorley and other heirs of McAleer for possession. The defendants set up McAleer's rights under the deed from Maynard, and his homestead application, and also bring an action to declare Hill a trustee for McAleer. In the ejectment suit they also attack the validity of Hill's patent, because they say the Porterfield warrants are not properly located, and therefore the patent is void. Both causes proceeded to trial by the court, and were heard together. In the first action, the ejectment suit, a judgment was awarded plaintiff for possession of the land, and a writ of possession

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directed. The second action was by the lower court dismissed, with a judgment for defendant for his costs. Mr. Hill died, and both these suits are continued in the name of Alice S. Hill as executrix.

*Jacobs & Jenner*, and *W. R. Andrews*, for appellants.

*Junius Rochester*, for appellee.

The opinion of the court was delivered by

DUNBAR, J.—The first question here is, did the deed from Maynard and wife to McAleer convey title to the land in question, or did Maynard and wife have any interest or right in said land which could by them be conveyed? Sec. 4 of the donation act of 1850 (9 U. S. St. at Large, 497) granted to every white settler of the public lands (with the necessary qualifications of age and citizenship), who was then a resident of the Territory of Oregon, or should become a resident therein on or before the 1st day of December, 1850, the quantity of one-half section or 320 acres of land for a single man, and for a married man, or if he should become married within one year from the 1st day of December, 1850, the quantity of one section, or 640 acres of land, one-half to himself and the other half to his wife, to be held by her in her own right; and provided that the surveyor-general should designate the part inuring to the husband and that to the wife. Maynard became a resident of Oregon prior to the 1st day of December, 1850, and was also a married man, being the husband of Lydia A. This relation was still continuing in April, 1852, when he made his settlement on a donation claim, and he and his wife were entitled to 640 acres, one-half to inure to him, and the other to his wife, Lydia A. But about the middle of December, 1852, he was divorced from Lydia A. On January 15, 1853, he was married to Catherine T. By this act of divorcement, the claim of Lydia A. to one-half

of the land became annulled, and Maynard became a single man. It would be a novel mode of administering the law to allow a man to escape marital responsibility by divorcing his wife, and still allow him benefits that attach exclusively by reason of his relation as a husband. Thirty days elapsed between the time he was divorced from Lydia A. until he was married to Catherine T. During these thirty days he was a single man, and it cannot be contended that he would have been entitled under § 4 to have claimed the provision giving to married men 640 acres each. After he became a married man again, and commenced the settlement with Catherine T., the law only allowed him, by reason of his marriage relations, 320 acres. The new wife should certainly not be allowed, either in morals or in law, to claim any rights through the wife whom she had supplanted. This provision of the law was made for the benefit of women who married prior to December 1, 1851. Catherine T. was not married prior to that date, and she must claim through her own marriage, and not the marriage of Lydia A. Maynard, by his own volition, destroyed the relationship which entitled him to 640 acres, and, so far as Maynard's interest is concerned, the extra 320 acres which a married man could take was not intended as a personal right attaching to or prerogative of the husband, which he could take from one wife by divorce-ment, and confer upon another; and he was not placed in any different position with reference to it by his marriage in 1853. This doctrine is substantially announced by the supreme court in *Maynard v. Hill*, 125 U. S. 216 (8 Sup. Ct. Rep. 723), where the court, in reference to the standing of this identical land, says:

“When, therefore, the act was passed divorcing the husband and wife, he had no vested interest in the land, and she could have no interest greater than his. . . . A divorce ends all rights not previously vested. Interests



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which might vest in time, upon a continuance of the marriage relation, were gone.”

There was only one way by which Catherine T. could have become entitled to 320 acres under the donation act, and that was to have married some qualified donation applicant prior to December 1, 1851. This she did not do. We do not think the claim of Catherine T. Maynard was within the letter or the spirit of the law. Sec. 5 of the act of February 14, 1853, which is amendatory of the act of September 27, 1850, in our judgment simply extends the time within which persons shall acquire title under the donation act, but it does not undertake to change the qualifications of the applicant. This, we think, has been the universal and unquestioned construction of this statute.

It is claimed by appellant that the acts of Maynard and his wife were of such a character as to create in them a vested right, although no patent had ever issued to them; and cites, to sustain this proposition, *Barney v. Dolph*, 97 U. S. 656; *Lytle v. State*, 9 How. 333; *Stark v. Starrs*, 6 Wall. 417; *Simmons v. Wagner*, 101 U. S. 260. We do not think that the cases cited support the contention. The provision in § 4 of the original donation law, prohibiting the sale of lands until after patent was issued, was repealed July 17, 1854. In *Barney v. Dolph*, the court decided that the repeal of this provision implied the power to convey all the government had parted with, but that was the extent of the decision. In that case it was not disputed that Waymire and his wife were entitled to patent; but here the testimony is that Catherine T. Maynard never could have secured a patent; that she had no right to a patent, and therefore had nothing to sell. *Simmons v. Wagner* was a case where the land was sold by the United States, and the purchase money paid. There the purchase money was the main consideration, and it was held that, where the right to a patent has once become vested in a

purchaser of public lands, it is equivalent, so far as the government is concerned, to patent actually issued. To the same effect is *Stark v. Starrs* and *Lytle v. State*; but these cases have no application to the case at bar, because the main question here is whether or not the right to patent ever did become vested. If we assume that it did, we take for our premises the very question in controversy. So far as cases are concerned which are cited showing that the final certificates of registers and receivers in pre-emption cases confer vested rights, they are not in point here; for, although this court is divided in its opinion as to the force and effect of such certificates (see *Pierce v. Frace, ante*, p. 81), yet such certificates stand on a distinct footing, the pre-emption law especially providing "that the proof of settlement and cultivation shall be made to the satisfaction of the register and receiver." Here a discretion is vested in the register and receiver. But § 7 of the donation law (act of 1850), among other provisions regarding the proof of donation settlers, says:

"And upon such proof being made, the surveyor-general, or other officer appointed by law for that purpose, shall issue certificates, under such rules and regulations as may be prescribed by the commissioner of the general land office, setting forth the facts in the case, and specifying the land to which the parties are entitled. And the said surveyor-general shall return the proof so taken to the office of the commissioner of the general land office; and, if the said commissioner shall find no valid objection thereto, patents shall issue for the land according to the certificates aforesaid, upon the surrender thereof."

No discretion whatever was given to the surveyor-general, but, on the contrary, it was especially conferred upon the commissioner. And in *Stark v. Starrs* the court decided, in construing this act, that the right of the claimant to a patent became perfected when the certificate of the surveyor-general and the accompanying proofs were re-

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ceived by the commissioner of the general land office, and he found no valid objections thereto. The main question in controversy in that case was, as to whether the land in controversy was brought under the operation of the town-site act by the organic law of August 14, 1848, establishing the territorial government of Oregon, thus rendering it not subject to the donation act of 1850; and it was upon this proposition that the commissioner objected to the issue of the patent to Stark, and not upon the ground that he found any fault with the proof made of settlement and cultivation under the donation act. And the supreme court of the United States, finding that the provisions of the town-site act did not embrace the land in controversy, and that it was subject to donation entry, and that the proof of residence and cultivation under the donation act had been made and submitted to the commissioner, and that he found no valid objections thereto, sustained Stark's entry. But that state of facts does not exist in this case. But on the other hand the commissioner, in construing the provisions of the donation law, raised an objection to the entry, and decided that Catherine T. Maynard had no rights to the land.

Concluding, then, that the Maynards had no vested rights in the land, we come to the consideration of the question whether or not McAleer is entitled to consideration as an innocent or *bona fide* purchaser for value. In support of the affirmative of this proposition, it is urged that the proofs were made in 1856, and that no fault had been found with them up to the time of his purchase, eleven years afterward; that he made the purchase in good faith, and without any knowledge or notice of defect in the title of his grantors, if one existed; that he was an innocent purchaser, and as such entitled to the same protection as if every requirement of the land laws had been complied with by his grantees; and *Colorado Coal, etc., Co. v. United States*, 123 U. S. 314 (8 Sup. Ct. Rep. 131), and many

other cases were cited in support of this doctrine. While some of the language in the Colorado case would seem, at first blush, to sustain the position of appellant, yet we think a careful examination of the whole case will not justify this conclusion. That was a bill in equity, filed in the name of the United States by the attorney-general, the object and prayer of which was to declare void and cancel sixty-one patents for as many distinct pieces of land alleged to have been fraudulently obtained through collusion and fraud; also that the land was not agricultural, but mineral, land, and therefore not subject to pre-emption entry. The answer of the defendants denied all the allegations in the bill alleging fraud, and denied that any of the lands were mineral lands, and alleged they were innocent purchasers in good faith. Under these issues, the court found that a fraud had been perpetrated upon the United States, and that the parties who acquired title under the patents knew nothing of the frauds; that it was not such a fraud as would prevent the passing of the legal title by the patents; and that it followed that, to a bill in equity to cancel the patents upon these grounds alone, the defense of a *bona fide* purchaser for value, without notice, is perfect; and stated, as an elementary doctrine of equity, that "where a grantor has been induced by fraud to part with the legal title to his property, he cannot reclaim it from subsequent innocent purchasers for value." It will be observed that the court was considering this case with reference to the passing of the legal title, and not a mere equitable interest, and a title, too, which was evidenced by the highest authority—a patent from the United States. The patents to all these different pieces of land having been issued prior to the deed made to the defendants, the court in that case rendered its decision with particular reference to the character of the title, as is easily gathered from its approval and quotation of the opinion of the supreme court of the

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United States in the *Maxwell Land Grant Case*, 121 U. S. 325 (7 Sup. Ct. Rep. 1015), where the court says:

“If the proposition as thus laid down in the cases cited is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal? In this class of cases the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles depending upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof.”

But in the case at bar McAleer is attempting to set aside this conveyance by the government, a conveyance by patent, an instrument under seal, and the signature of the president of the United States; a proof of title which is commonly accepted and relied upon by the unprofessional mind as conclusive. And what claim does he interpose against it? Not a patent to the land himself, as did Stark in the case cited by appellant of *Stark v. Starrs*; not a deed from parties whose qualifications under the donation act were unquestioned, and whose rights to a patent to the land, by reason of their fulfillment of the requirements of the law, were conceded by all parties to the controversy, as did Dolph in *Barney v. Dolph*; but a deed from a party who the land department decided had no rights to the land, in controversy, and to land which the department, as we believe rightfully, restored to the public domain. And this deed was, as the record shows, given to McAleer more than a year before the original donation certificate issued to his grantors from the local land office. So that McAleer simply took by that deed what the Maynards had a right to sell; and, as they had no right to sell anything, he took

nothing. He purchased an inchoate or imperfect title, and he must stand or fall by it as it existed in the hands of his grantors. *Kramer v. Arthurs*, 7 Pa. St. 170; *Briscoe v. Ashby*, 24 Gratt. 478.

Concluding, then, that McAleer has no rights under his deed from the Maynards, we come to the consideration of the rights he claims to have acquired by virtue of his homestead application. After his pre-emption claim, which he made in 1874, had been decided against him by the commissioner, and subsequently, on appeal, by the secretary of the interior, he made application to make homestead entry. This was on April 1, 1880. The district land office refused the application. Whatever rights he may have had under that application, by reason of residence or otherwise, we are not called upon to investigate here; for he had the right of appeal, and did not avail himself of it, and that application was virtually abandoned. However, we seriously question if § 3 of the act of May 14, 1880, could be construed to confer any right in McAleer, as against rights of other parties existing at the time of the passage of the act; and are inclined to think that it was the intention of the law not to interfere with any intervening rights, the same as many other provisions of the land laws for the relief of settlers. Prior to McAleer's application, and prior to the passage of the act of May 14, 1880, to wit, on January 8, 1880, Lewis and Hill made application to locate Porterfield warrants on the land in question. This application was rejected for the reason that the land was embraced within the limits of the town of Seattle, but afterwards, upon appeal, it was allowed, and in course of time patents were issued therefor. On the 16th day of December, 1880, the application of the city of Seattle for the land was withdrawn. On that day McAleer made homestead application for the land, and his application was rejected on the ground that such land had been previously applied for by said Lewis and Hill.

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With this view of the law, then, the controversy is narrowed to this proposition: Were the lands legally located by the said Porterfield scrip? Appellants contend — *First*, That Porterfield warrants are not locatable upon occupied lands; *second*, that the warrants are not assignable; and, *third*, that the warrants are not locatable upon unoffered land. The act of congress approved April 11, 1860, entitled "An act for the relief of the legal representatives of Charles Porterfield, deceased," provides, among other things, that Porterfield warrants may be located on any of the public lands which have been and may be surveyed, and which have not been otherwise appropriated at the time of such location, within any of the states of the United States where the minimum price for the same shall not exceed \$1.25 per acre, etc. It is claimed by the appellee that the phrase "otherwise appropriated" means any public lands not regularly appropriated by virtue of some provision of law for its disposition; and it is insisted that the language in this case is distinguished from that employed in the act of April 5, 1872, providing for the location of Valentine scrip, where the language was, "such scrip may be located upon any of the unoccupied and unappropriated lands of the United States." This is the construction given to this expression by the land department, and, in our judgment, is the correct one. There would be no reason or justice in allowing a mere unauthorized and illegal occupancy to prevent the location; and, if appellant's interpretation is to be accepted, it matters not how illegal or unwarranted the occupancy may be. Besides, there is a well recognized difference in the words. Webster's first definition of "appropriation" is, "setting apart for a particular use." Occupancy may always include an appropriation, but an appropriation does not necessarily include occupancy. For instance, the government may appropriate land for military reservations or Indian reservations, but they may or may

not occupy them as such. This is a word commonly used by the government in setting aside lands for special purposes, and we cannot give it the construction claimed by appellee without doing violence to its generally accepted meaning. This is the view evidently taken by the supreme court of the United States in the case of *Wilcox v. Jackson*, 13 Pet. 512, where the court says:

“Now, this is appropriation, for that is nothing more nor less than setting apart the thing for some particular use.”

As to the assignability of these warrants, the act for the relief of Porterfield provided for the appropriation of these lands according to the directions contained in his last will and testament; and the will, which is filed as an exhibit in this case, “authorizes and empowers the trustees, in their discretion, to sell or exchange, or otherwise dispose of, all or any part of the property herein given in trust, and the proceeds arising from such sale, exchange, etc., to re-invest in other property.” Construing the act in connection with the will referred to by the act, it appears to us that the intention of congress was to make the warrants assignable. By the ancient common law, things in action, expectancies, possibilities and the like were not assignable, and the assignee thereof acquired no rights which were recognized by a court of law; and says Mr. Pomeroy:

“The court of chancery from an early day rejected this rule as narrow, and even absurd. . . . Equity has always held that the assignment of a thing in action for a valuable consideration should be enforced.” Pom. Eq. Jur., § 1270.

Again, the act was so construed by the executive department of the government, which was charged with issuing the warrants in form; and the said warrants are on their face issued to William Kinney and Thomas J. Michie, as executors of Robert Porterfield, deceased, or their assignees,



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etc.; and a note at the bottom of the warrants, over the signature of the commissioner of the general land office, is as follows:

“This warrant may be located upon unoffered land, and is assignable in the manner and form prescribed by the rules and regulations of this office under the act of March 3, 1855.”

The statute having been thus construed by the executive department of the government, and innocent parties having acquired rights under that construction, those rights ought not to be divested, unless it clearly appears that the construction was wrong. The supreme court of the United States, in *United States v. Moore*, 95 U. S. 763, says:

“The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.”

In support of this doctrine is cited *Edwards v. Darby*, 12 Wheat. 210; *United States v. Bank*, 6 Pet. 29, and *United States v. Macdaniel*, 7 Pet. 1. In *Brown v. United States*, 113 U. S. 568 (5 Sup. Ct. Rep. 648), it was held that, in case of ambiguity in a statute, contemporaneous and uniform executive construction is regarded as decisive. To the effect that great weight should be given to such construction, we cite *Edwards v. Darby*, 12 Wheat. 206; *Manufacturing Co. v. Ferguson*, 113 U. S. 727 (5 Sup. Ct. Rep. 739); *United States v. Dickson*, 15 Pet. 141; *United States v. Gilmore*, 8 Wall. 330. In addition, we see no reason why these warrants should be excluded from the provisions of § 1 of the act of March 22, 1852, entitled “An act to make land warrants assignable, and for other purposes.” That act is sweeping in its declarations. It declares “that all warrants [for military bounty lands,

which have been or may hereafter be issued under any law of the United States, . . . are hereby declared to be assignable," etc. It is true that these warrants are not like some other military land warrants, but they were given to Porterfield's heirs for military services rendered by Porterfield or in lieu of other lands which had been given to him for such services in the Revolutionary war, which amounted to the same thing, and are to all intents and purposes military land warrants, and as such are assignable under the general statute.

We do not think from the language of the statute, that it contemplated restricting these locations to lands only that were subject to private entry; or, in other words, to simply fix upon them a value of \$1.25 per acre; and, unless it clearly appears from the act that such was the intention, the executive department having placed the other construction upon the act, and having made them locatable upon unoffered land upon their face, under the doctrine of the law in the last cases above cited, we do not think we are justified in disturbing rights that have been acquired under this construction of the law. There is no question but that many of the equities in this case are in favor of McAleer and his heirs, and, were we to decide the case upon sympathy, our judgment would probably be different; but, as we view the law, there is no escape from the conclusions we have reached. In the court below damages were awarded in the sum of \$750 to appellee for the detention of the premises, without allowing anything for the improvements made. Section 541 provides that, "when permanent improvements have been made upon the property by the defendant, or those under whom he claims, holding under color of title, adversely to the claim of the plaintiff, in good faith, the value thereof at the time of trial shall be allowed as a set-off against such damages." Under this statute, appellee

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Syllabus.

in this court waives any right to damages, and consents that the judgment be so modified.

The order of the court is, that the judgment of the court below be so modified, and that with such modification judgment is affirmed.

ANDERS, C. J., and SCOTT, STILES, and HOYT, JJ., concur.

[No. 197. Decided August 1, 1891.]

PATRICK MCALEER *et al.* v. ALICE S. HILL, *Executrix*.

*Jacobs & Jenner*, and *W. R. Andrews*, for appellants.

*Junius Rochester*, for appellees.

DUNBAR, J.—For the reasons assigned in the case of *Charles McSorley and Ellen McSorley v. Alice S. Hill, Executrix, etc., ante*, p. 638, the judgment in this case is affirmed.

ANDERS, C. J., and SCOTT, STILES, and HOYT, JJ., concur.

[No. 205. Decided August 1, 1891.]

JOHN NOYES v. B. A. PUGIN.

BREACH OF CONTRACT—QUANTUM MERUIT—MEASURE OF DAMAGES—EVIDENCE—WEIGHT—INSTRUCTIONS.

In an action by an architect to recover for services, the refusal of the court to set aside a verdict for plaintiff, on the ground that the evidence fails to show any employment of the architect by defendant, is not error, when both parties testified fully and there was a direct conflict in their testimony, as it is for the jury to determine, under all the facts and circumstances before them, upon which side lay the preponderance of evidence.

2b	653
7	499
27*	548
35*	375
2	653
Case 2	
635	635

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Opinion of the Court — ANDERS, C. J.

[2 Wash.]

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Where a party performs services under a contract, specifying the price to be paid for doing the whole work agreed on to be done, but is prevented by the act of the other contracting party from doing the whole work, the measure of damages, in an action upon *quantum meruit*, is such a proportion of the contract price as the work done bears to the whole work embraced by the terms of the agreement.

In an action upon a *quantum meruit* for services rendered by an architect, testimony showing the customary price charged by architects for similar services is competent, where there is a conflict of evidence as to whether or not there was a rate of compensation agreed on.

A charge to the jury that plaintiff must establish all his material allegations by a preponderance of the testimony is not erroneous, because the word "testimony" is used in place of "evidence," as it will not be presumed the jury were misled thereby.

(DUNBAR, J., dissents.)

*Appeal from Superior Court, King County.*

The facts are sufficiently stated in the opinion.

*G. E. M. Pratt*, and *Thompson, Edsen & Humphries*, for appellant.

*Strudwick & Peters*, and *Moore & Turner*, for appellee.

The opinion of the court was delivered by

ANDERS, C. J. — This action was brought by respondent in the court below upon a *quantum meruit* for services alleged to have been rendered for and at the request of appellant, as architect in drawing plans and making estimates for the erection of a building to be known as the "Noyes Block" in the city of Seattle. A general denial was filed by the defendant, and upon the issues thus joined a trial was had by a jury, who returned a verdict for plaintiff for the amount claimed in the complaint.

It appears from the record that the plaintiff testified substantially, at the trial, that the defendant, at a certain time and place, told him that two architects (as he recollected or thought) had proposed to make drawings or

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Aug. 1891.] Opinion of the Court—ANDERS, C. J.

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sketches of the proposed building, with the understanding that, if the sketches were not adopted by defendant, the latter was to pay nothing for the work, and that he would like to have plaintiff also make such sketches upon the same terms; that plaintiff accepted the proposal, made the sketches, and submitted them to the defendant, who expressed himself satisfied, and stated that they were just what he wanted, and gave plaintiff the order to go on and complete the drawings; that he agreed with defendant to make the drawings and specifications complete, let the contract, and superintend the erection of the building, for three and one-half per cent. of the estimated cost thereof; that he completed the plans, and wrote the specifications in full, with the exception of some minor details as to the interior finish; and that the defendant, on being notified that the plans were ready, refused to accept the same, and denied ever having requested or ordered plaintiff to do the work. The plaintiff estimated the cost of the building according to his plans and specifications at \$90,000, and testified that the labor performed by him in making the drawings and specifications was worth two and one-half per cent. of that sum; and in this he was corroborated by other witnesses. Several architects also testified that the usual price charged by architects for drawing plans and specifications and superintending the erection of buildings, or, in other words, for "full professional services," was five per cent. of the estimated cost. The defendant claimed and testified that he never employed or requested plaintiff to make plans and specifications for his building; that the only agreement or understanding between him and plaintiff was that if the latter should submit sketches which should be adopted by defendant, then and in that event he was to pay plaintiff for the work, but not otherwise; and that plaintiff proposed to do the whole work for two and one-half per cent. of the cost of the building; and that plaintiff,

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Opinion of the Court—ANDERS, C. J.

[2 Wash.]

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Where a party performs services under a contract, specifying the price to be paid for doing the whole work agreed on to be done, but is prevented by the act of the other contracting party from doing the whole work, the measure of damages, in an action upon *quantum meruit*, is such a proportion of the contract price as the work done bears to the whole work embraced by the terms of the agreement.

In an action upon a *quantum meruit* for services rendered by an architect, testimony showing the customary price charged by architects for similar services is competent, where there is a conflict of evidence as to whether or not there was a rate of compensation agreed on.

A charge to the jury that plaintiff must establish all his material allegations by a preponderance of the testimony is not erroneous, because the word "testimony" is used in place of "evidence," as it will not be presumed the jury were misled thereby.

(DUNBAR, J., dissents.)

*Appeal from Superior Court, King County.*

The facts are sufficiently stated in the opinion.

*G. E. M. Pratt*, and *Thompson, Edsen & Humphries*, for appellant.

*Strudwick & Peters*, and *Moore & Turner*, for appellee.

The opinion of the court was delivered by

ANDERS, C. J.—This action was brought by respondent in the court below upon a *quantum meruit* for services alleged to have been rendered for and at the request of appellant, as architect in drawing plans and making estimates for the erection of a building to be known as the "Noyes Block" in the city of Seattle. A general denial was filed by the defendant, and upon the issues thus joined a trial was had by a jury, who returned a verdict for plaintiff for the amount claimed in the complaint.

It appears from the record that the plaintiff testified substantially, at the trial, that the defendant, at a certain time and place, told him that two architects (as he recollected or thought) had proposed to make drawings or

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Aug. 1891.]      Opinion of the Court—ANDERS, C. J.

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sketches of the proposed building, with the understanding that, if the sketches were not adopted by defendant, the latter was to pay nothing for the work, and that he would like to have plaintiff also make such sketches upon the same terms; that plaintiff accepted the proposal, made the sketches, and submitted them to the defendant, who expressed himself satisfied, and stated that they were just what he wanted, and gave plaintiff the order to go on and complete the drawings; that he agreed with defendant to make the drawings and specifications complete, let the contract, and superintend the erection of the building, for three and one-half per cent. of the estimated cost thereof; that he completed the plans, and wrote the specifications in full, with the exception of some minor details as to the interior finish; and that the defendant, on being notified that the plans were ready, refused to accept the same, and denied ever having requested or ordered plaintiff to do the work. The plaintiff estimated the cost of the building according to his plans and specifications at \$90,000, and testified that the labor performed by him in making the drawings and specifications was worth two and one-half per cent. of that sum; and in this he was corroborated by other witnesses. Several architects also testified that the usual price charged by architects for drawing plans and specifications and superintending the erection of buildings, or, in other words, for "full professional services," was five per cent. of the estimated cost. The defendant claimed and testified that he never employed or requested plaintiff to make plans and specifications for his building; that the only agreement or understanding between him and plaintiff was that if the latter should submit sketches which should be adopted by defendant, then and in that event he was to pay plaintiff for the work, but not otherwise; and that plaintiff proposed to do the whole work for two and one-half per cent. of the cost of the building; and that plaintiff,

at the time of said proposal, stated that the building could be constructed for \$60,000.

The first contention of appellant is that the evidence fails to show any employment of respondent by him, or that he ever requested the latter to perform the labor for which he now seeks compensation, and that the court below erred in not setting aside the verdict for insufficiency of the evidence. Upon that point both parties testified fully; and, there being a direct conflict between the testimony of plaintiff and defendant, it was for the jury to determine, under all the facts and circumstances before them, upon which side lay the preponderance of the evidence; and, not being convinced that the verdict was unwarranted by the evidence, we cannot say that the court erred in refusing to set it aside and grant a new trial upon the ground above indicated.

Counsel for appellant further contend that the court erred in charging the jury as to the measure of damages recoverable by plaintiff. The following is the instruction complained of:

“If you find from the evidence that there was a contract of employment to do the work as claimed by plaintiff, your next inquiry should be, did the plaintiff do the work as requested? If he has, he is entitled to recover what the evidence shows such work to be reasonably worth. Was there a contract to do this work that the plaintiff claims? If there was not, he is not entitled to recover. If there was a contract, and he has performed the work according to that contract, he is entitled to recover what the evidence shows the services were worth.”

The point made is that, as the plaintiff claimed to have done the work under a contract whereby he was to receive three and one-half per cent. upon the estimated cost of the building as compensation for his entire services, the jury should have been instructed that he could only recover what the services rendered were worth, at the contract



price. On the other hand, the respondent claims that, as the contract was broken by appellant, he was no longer bound by its terms, and was entitled to recover what he could show his labor was worth; or, in other words, that the law implies a contract, in such cases, to pay the reasonable value of the work done, without regard to the original agreement between the parties. And the question for our determination is, which of the two theories should be adopted in the case at bar. The plaintiff had his choice of two remedies, viz.: Either to bring his action for a breach of the contract—in which event he might have recovered not only the value of the labor actually performed, at the contract price, but also all profits he might have shown would have been realized by him if he had been permitted to do the entire work in accordance with the terms of the agreement—or to disregard the contract and sue for the value of his services. He chose the latter alternative, and must be confined to such an amount as he ought to recover under the circumstances. In regard to the measure of damages, it is a universal and cardinal principle that the person injured shall receive a compensation commensurate with his loss or injury, and no more; and it is a right of the person who is bound to pay this compensation not to be compelled to pay more, except costs. Sutherland on Damages, p. 17, § 1, and cases cited. Applying this principle to the case before us, what should be the compensation of appellant for the work actually done? His labor conferred no benefit upon appellant, because his plans were not adopted or used by the latter; and hence the cases holding that a defendant who has prevented the other party from fully performing his contract of service must pay for benefits received are not applicable to this case. He proved by a number of witnesses that the whole work he agreed to do was worth five per cent. of the cost of the building, which was placed by him at \$90,000, and

the part performed was worth two and one-half per cent., and the jury by their verdict awarded him that proportion of \$90,000. But he also testified, as we have seen, that he agreed to do the entire work of drawing the plans and specifications, letting the contract and superintending the erection of the building for three and one-half per cent. of the estimated cost. If, therefore, he had performed the whole work according to his agreement, and appellant had neglected or refused to pay him therefor, and he had brought his action upon the common counts for work and labor, instead of suing upon the contract, the measure of the recovery, according to the adjudged cases, would have been the contract price. And, this being so, it is difficult to perceive why the respondent in this case should receive more compensation for the labor actually performed by him than he would have received for the same services had the contract not been broken by appellant. The authorities which hold the contrary doctrine, and maintain that the plaintiff in such cases may recover what his labor was actually worth, without regard to the contract, proceed upon the theory that, if one party to an agreement sees fit to violate it, the law will then step in and imply a new and different one in favor of the other party to the contract. But we think it is rather the province of the law to provide remedies for enforcing contracts, and for indemnifying parties injured by their breach, than to make new and different ones. In cases where one party performs labor for another at his request, and without any stipulation as to remuneration therefor, then it is but just that the party performing should be paid what his services are reasonably worth, as that is presumed to have been their mutual understanding, and as otherwise he would be without remedy; but, when the parties themselves have agreed upon a price to be paid for services rendered by one for the other, that price, so far as it can be made applicable, should be the

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measure of compensation for work done under the contract.

The rule is well stated by SUTLIFF, J., in *Doolittle v. McCullough*, 12 Ohio St., at pages 366 and 367, as follows:

“But when the special contract is proved, whether by the plaintiff or defendant, under which the services were rendered, the special, and not the implied contract must determine the rights and liabilities of the parties arising in regard to the services. The price having been determined and mutually agreed upon by them, neither of the parties can vary the price so fixed by the contract. Nor, as to the price of the services actually rendered under the contract while in force between the parties, can it avail the plaintiff, bringing his action to recover therefor, that since the rendering the services the defendant has put an end to the special contract. The fact would still remain that the services were rendered under a special contract, and at the price agreed upon, and expressed by the parties, and if the action upon the contract so made by the parties, and terminated by the defendants against the will of the plaintiff, be brought to recover damages generally, the same rule would apply as to the services actually rendered. The party having rendered the services would be entitled to recover at the rate agreed upon and stipulated in the contract between the parties, although of much less value than the price expressed in the contract; and in like manner the plaintiff would be restricted to the amount stipulated in the contract as the agreed price, although actually of much greater value.”

And on page 369 it is further said that “it may be laid down as a rule in all such cases, that the express contract so existing between the parties necessarily furnishes the measure of damages to the extent of the evidence thereby afforded, and to the same extent as in actions brought to recover damages in like cases where the contract continues in force, and has not been terminated, but only neglected and unperformed on the part of the defendant.” See, also, *Koon v. Greenman*, 7 Wend. 121; *Bagley v. Bates*,

Wright, 705; *Chicago v. Tilley*, 103 U. S. 146; *Western v. Sharp*, 14 B. Mon. 177; Field, Damages, 302. We are aware that in a considerable number of decisions found in the books the doctrine is broadly stated that in cases like this the plaintiff may recover the reasonable value of the services rendered, irrespective of the price stipulated and agreed upon by the parties; but we think the more just and equitable rule to be that laid down by the court in *Doolittle v. McCullough*, *supra*. Upon this question, Mr. Sedgwick, while appearing to incline to the opposite doctrine, in his work on the Measure of Damages (volume 1, pp. 473, 474, 7th ed.), says:

“So, also, if the contract is rescinded, one party stopping the work while the other is ready to proceed. In this case he is at liberty to prove the value of his services, but the contract is, nevertheless, not to be altogether disregarded.”

It was not shown in this case that it was impracticable to apportion the value of plaintiff's services according to the rate of compensation claimed to have been stipulated for, and we are therefore of the opinion that the court below should have instructed the jury that, if they found that the plaintiff performed the services claimed to have been rendered by him under a contract specifying the price to be paid for doing the whole work agreed to be done by him, the measure of his recovery would be such a proportion of the contract price as the work done bore to the whole work embraced by the terms of the agreement, and that the failure to so instruct was error.

Counsel for appellant also insist that the court erred in permitting the respondent to show the customary price charged by architects for such services as those rendered by appellant. But from what we have already said it is scarcely necessary to discuss that question. It is sufficient to remark that where no rate of compensation has been

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agreed upon, or where there is a conflict of evidence as to whether there was a rate agreed on or not, such testimony is competent; but where a contract for a specified sum is proved, as before stated, the parties must be controlled by it.

It is further contended that the court below erred in charging the jury that before the plaintiff could recover he must establish the truth of all the material allegations of the complaint by a preponderance of the testimony. It is claimed that the court should have used the word "evidence" instead of "testimony," and that a failure to do so was error. While there is, perhaps, a technical legal distinction between the two words, we have no doubt the same meaning was conveyed to the minds of the jury by the word "testimony" that would have been conveyed by the word "evidence," and that appellant was in no wise injured by the charge of the court as given. Indeed, the words, according to Bouvier, are synonymous in meaning, though "evidence" includes "testimony," as well as all other kinds of proof. Bouv. Law Dict., tit. "Testimony."

The judgment of the court below is reversed, and the cause remanded for a new trial in accordance with this opinion.

STILES, HOYT, and SCOTT, JJ., concur.

DUNBAR, J., dissents.

[No 261. Decided August 1, 1891.]

THE STATE OF WASHINGTON, *on the Relation of T. M. Reed, A. A. Lindsley, George A. Black, S. B. Conover, Andrew H. Smith, J. H. Bellinger, Eugene Fellows, and Geo. W. Hopp, v. W. L. JONES AND FREMONT CAMPBELL, Judge of the Superior Court of Pierce County, Washington.*

WRIT OF PROHIBITION—REMEDY BY APPEAL.

The writ of prohibition will not lie to restrain courts having original jurisdiction of cases in equity from issuing injunctions in excess of their jurisdiction, when there is a complete remedy by appeal from any final judgment that may be rendered by said courts in such cases.

*Original Application for Prohibition.*

*Turner & Graves, and W. C. Jones, for petitioners.*  
*Crowley & Sullivan, and H. J. Snively, for respondents.*

The opinion of the court was delivered by

ANDERS, C. J.—This is an application for a writ of prohibition commanding the judge of the superior court of Pierce county, and the respondent Jones, to refrain from further proceedings in a certain action pending in said court wherein the said W. L. Jones is plaintiff, and the relators are defendants, which action was brought to restrain the relators, George A. Black, S. B. Conover and Andrew H. Smith, as commissioners appointed by the acting governor of the state to locate a site for an agricultural college, from further proceedings in the matter of said location; and the relators, S. B. Conover, Andrew H. Smith, Geo. W. Hopp, J. H. Bellinger and Eugene Fellows, as the board of regents of said college appointed by the said acting governor, from doing any act whatever as such board of regents; the relator, T. M. Reed, as state auditor, from

2	662
3	708
2	662
4	37
27*	452
29*	706
2	662
15	266
15	270
2	662
120	504
20	505
20	506
2	662
21	574
2	662
26	284

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issuing any warrant or warrants for the payment of the appropriation made by the legislature for the establishment and maintenance of an agricultural college and school of science; the relator, A. A. Lindsley, as state treasurer, from paying such warrant or warrants; and to have the said Black, Conover and Smith decreed usurpers and intruders as commissioners under the act of the legislature of March 9, 1891, entitled, "An act to provide for the location and maintenance of the agricultural college, experiment station, and school of science of the State of Washington, and declaring an emergency;" and their location of said college at Pullman declared null and void, and their commissions canceled.

It is alleged in the petition of relators that the defendant, Fremont Campbell, as judge of said superior court, on the 20th day of May, 1891, issued a temporary restraining order as prayed for, and further ordered petitioners to show cause before him on May 29, 1891, at the courthouse, in the city of Tacoma, Pierce county, Washington, why such temporary restraining order should not be continued *pendente lite*, and, upon the final hearing of the cause, be made perpetual; that thereafter petitioners appeared before said Fremont Campbell, and moved him, as judge of said court, to vacate and set aside said temporary restraining order, and to vacate said ruling to show cause, upon the grounds—(1) that the complaint did not state a cause of action as against petitioners, or either of them; (2) that there was no equity in said complaint as against petitioners, or either of them; (3) that said court had no jurisdiction of said cause, or of the matters and things alleged in said complaint, or any of them, or of the relief sought by said complaint, or of any part thereof, as against petitioners, or any of them; and (4) that said court had no jurisdiction of said cause as against petitioners, or any of them; that said motion was by said judge overruled, to

which ruling petitioners excepted, and said exception was allowed by the court; that thereafter said petitioners demurred to said complaint upon the same grounds stated and set forth in the above motion; and that thereafter said Fremont Campbell overruled said demurrer, and held that he had jurisdiction of said cause, as against each and every of the defendants, and jurisdiction to grant the said restraining order *pendente lite*, and to hear and determine said cause.

The petition further alleges that the said Fremont Campbell, unless prohibited by this court, will continue to restrain petitioners pending the litigation, and will upon the final hearing of the cause, grant the relief prayed for in the complaint, and make the said injunction perpetual, unless petitioners show to him, as said judge, some matters of fact other and different from those alleged in said complaint, sufficient, in his opinion, to prevent the granting of such relief. It is also alleged and suggested in the petition that the said superior court is wholly without jurisdiction, under the constitution and laws of the state, to hear, try and determine the said cause as made by the said complaint, or to grant the restraining order, or to grant the relief prayed for in said complaint, or to perpetually enjoin petitioners, as prayed for in said complaint; and that the said Fremont Campbell, in attempting to grant said restraining order and to hear and determine said cause, is acting wholly in excess of the jurisdiction conferred upon him, as judge of said court, by the constitution and laws of this state; and that petitioners are without any speedy and adequate remedy, other than the writ of prohibition.

Interesting and elaborate arguments were made, on the hearing of this petition, by the learned counsel of the respective parties, upon the question of the jurisdiction of this court, and of the superior court, as well as upon the



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merits of the action sought to be prohibited. But, as we view the case presented for our consideration, it is not necessary for us to determine or discuss the merits of the controversy at this time. Conceding that this court has power to issue the writ of prohibition to the superior court, the next question is, does the petition present a proper case for the exercise of that power? And that depends upon the further question of whether the superior court has jurisdiction in the premises and whether the relators have any other remedy than that of prohibition, whereby their grievances may be redressed. The superior courts of this state are courts of general jurisdiction. The state constitution provides that the superior courts shall have original jurisdiction of all cases in equity. See Const., art. 4, § 6. Counsel for the relators do not deny the power of the superior court to issue injunctions generally, but contend that the court in this instance has exceeded its jurisdiction, for the reason that the relators are public officers, and therefore a court of equity will not assume jurisdiction to control their official acts. Granting this to be true, it follows that the court below should have sustained the motion to dissolve the preliminary restraining order, or should have sustained the demurrer to the complaint for not stating a cause of action; but it does not follow, as matter of right, that the petitioners are entitled to a writ of prohibition.

Prohibition, being an extraordinary remedy, is only to be resorted to in cases where the usual and ordinary forms of remedy are insufficient to afford redress. It will not be allowed to take the place of an appeal or writ of error. High, Extr. Rem., §§ 770, 771. In *Ex parte Greene*, 29 Ala. 58, STONE, J., in speaking of a bill for an injunction, said:

“The bill may abound in imperfections, may be fatally wanting in necessary averments, or may be instituted in a

district in which the defendants were not liable to be sued. These, if they exist, are proper matters of defense, and cannot be reached by this extraordinary process.”

And in *Ex parte Roundtree*, 51 Ala. 51, the court says:

“If the court is one of established jurisdiction, a plea that the subject-matter of a particular suit lies without its jurisdiction, or that the party is not amenable to its cognizance, will ordinarily afford full relief. But when the question involves the legal existence and construction of a court—a denial of all jurisdiction, and not of the particular jurisdiction proposed to be exercised—a prohibition, it seems to us, is the only adequate remedy.”

This, it appears to us, is a clear and explicit statement of the law, and the language is peculiarly applicable to the case at bar. We are all of the opinion that the relators have a complete remedy by appeal from any final judgment that may be rendered by the superior court, and that there is therefore no necessity for resorting to the extraordinary remedy of prohibition. See *Powelson v. Lockwood*, 82 Cal. 613 (23 Pac. Rep. 143); *Murphy v. Superior Court*, 84 Cal. 592 (24 Pac. Rep. 310); *People v. District Court*, 11 Col. 574 (19 Pac. Rep. 541); *Strouse v. Police Court*, 85 Cal. 49 (24 Pac. Rep. 747); *Ex parte Braudlacht*, 2 Hill, 367 (38 Am. Dec. 593). It was suggested on the argument by the learned counsel for the petitioners that an appeal would be futile in this case, because the same questions would be presented on appeal that the court is now called upon to determine. But the fact that the same questions can be so presented is a sufficient reason for withholding the writ, as the above authorities and many others that might be cited abundantly show.

The petition is denied, and the superior court will proceed in the matter in question.

STILES, DUNBAR, HOYT, and SCOTT, JJ., concur.

Aug. 1891.]

Statement of the Case.

[No. 267. Decided August 1, 1891.]

J. E. AUSTIN AND JOHN H. CARR v. THE CITY OF SEATTLE, HARRY WHITE, *as Mayor of said City*, H. W. MILLER, *as Clerk of said City*, C. W. FERRIS, *as Comptroller of said City*, W. L. AMES, *as Treasurer of said City*, W. V. RINEHART, C. H. HEILBRON AND J. F. COCHRAN, *as the Board of Public Works of said City*.

2	667
25	811

MUNICIPAL BONDS—STREET ASSESSMENTS—LIMIT OF INDEBTEDNESS  
—UNIFORM TAXATION.

Article 8, § 7 of the charter of the city of Seattle, adopted in 1890, providing that the cost of improving streets in said city shall be assessed upon the lands benefited thereby in proportion to their frontage upon the improvement, is not in violation of the constitutional provision that taxes shall be according to value, and shall be equal and uniform.

Article 8, § 9 of the charter of the city of Seattle (1890), providing that "the city shall be liable for the payment of both principal and interest" of bonds issued for the payment of local improvements, the cost of which is to be assessed against the property benefited, makes the city primarily liable for such indebtedness; and where the city's existing indebtedness is in excess of the one and one-half per cent. limit prescribed by the constitution, the assent of three-fifths of its voters is necessary to authorize the issuance of such bonds.

Indebtedness for water, sewerage and light purposes does not constitute a part of the general indebtedness of the city, but is authorized, under article 8, § 6 of the constitution, in excess of the five per cent. of municipal indebtedness permitted for general purposes.

*Certified from Superior Court, King County.*

Action by J. E. Austin and John H. Carr against the city of Seattle to enjoin the issuance and sale of street improvement bonds. Judgment for defendant. Plaintiffs appeal.

*A. Battle*, for appellants.

*Orange Jacobs*, for respondent.

The opinion of the court was delivered by

STILES, J.—There are two questions presented for decision in this case: (1) Is the provision of § 7, article 8 of the charter of the city of Seattle, adopted October 1, 1890, constitutional, it providing that the cost of improving streets in that city shall be assessed and levied upon the property benefited thereby and abutting thereon, to the center of the blocks, or to the distance of 120 feet on each side of the improvement, if the abutting land is not platted, and that the said cost shall be assessed upon such property in proportion to the number of feet of such lands or lots fronting thereon? (2) It being conceded that the city of Seattle has already passed the one and one-half per cent. limit of indebtedness, can it, without popular vote to increase its indebtedness, issue street improvement bonds under the provisions of § 9, article 8 of said charter.

1. The first proposition, it is claimed by the appellants, must be answered in the negative, because, under the constitution, all taxes and assessments for such special purposes must be levied according to the value of the property taxed. It is true that article 7 of the constitution expressly provides that taxes in the State of Washington shall be according to value, and also that they shall be equal and uniform. It is true, also, that it must be conceded that special taxes or assessments levied for local improvements in cities and towns are so levied under the exercise of a branch of the taxing powers of the state. But, while the question has heretofore been the subject of much controversy in the courts, we think the doctrine is well established at this time that the general use of the term "taxes" in the constitution does not necessarily include what is meant by the term "assessments," in connection with street and other local improvements, but applies only to the larger exercise of the sovereign power of the state, either directly or through its inferior

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instrumentalities of county, city, town, school district, etc., in raising general revenues for the support and maintenance of government. In some of the states, as Illinois, Wisconsin, Tennessee and Alabama, under their earlier constitutions, in which there was no particular mention of assessments or special taxes, but only a general provision that taxes should be equal and uniform and according to value, it was held by the courts of those states that there could be no such thing as a special local assessment upon a portion of the property within the limits of a municipal corporation to defray the expenses of improvements peculiarly beneficial to such local areas; *City of Chicago v. Larned*, 34 Ill. 203; *Mobile v. Dargan*, 45 Ala. 310; *Weeks v. Milwaukee*, 10 Wis. 242; *McBean v. Chandler*, 9 Heisk. 349 (24 Am. Rep. 309); the theory of those courts being that any improvement made by a municipal corporation which would authorize taxes of any kind to pay for it must be a public improvement, and therefore must be paid by the public generally, through the levy of taxes upon the whole community. In Alabama, under the constitution of 1875, the provisions of which are very similar to our own, the case of *Mobile v. Dargan* was disregarded, and the correctness of its reasoning criticised and denied. *Mayor, etc., v. Klein*, 89 Ala. 461 (7 South. Rep. 386). And in Illinois, under her constitution of 1870, which contains a provision in almost the exact language of section 9, art. 7 of our own constitution, the case of the *City of Chicago v. Larned* was held to be no longer applicable; the court holding that an assessment according to frontage was not unconstitutional. *White v. People*, 94 Ill. 604. In *Peay v. Little Rock*, 32 Ark. 31, we find the only case which holds, under a constitutional provision similar to our own, that an assessment according to frontage is not a lawful assessment. This case was strongly relied upon in the argument to sustain the appellants' point, but an investigation of it shows

that the supreme court of that state based its decision mainly upon the older cases in Illinois and Wisconsin, some of which, as we have seen, have since been overruled in the states where they were made; and the argument in *Peay v. Little Rock* is so clearly, as we think, based upon the theory that there can be no valid local assessment, that its value as an authority is destroyed.

Section 9, art. 7 of our constitution is as follows:

“Sec. 9. The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.”

The discussion of this identical section in the constitution of Illinois, found in the case of *White v. People, supra*, is so thorough and full that it is not necessary for us to enter upon a further examination. In this case the legislature has seen fit to leave the matter of determining in what mode street assessments shall be levied to the people of the city of Seattle, and they have chosen “frontage” as their system. Concerning this method, Cooley on Taxation (page 644, 2d ed.), says:

“In many instances . . . the legislature has deemed it right and proper to take the line of frontage as the most practical and reasonable measure of probable benefits, and making that the standard, to apportion the benefits accordingly. Such a measure of apportionment seems, at first blush, to be perfectly arbitrary, and likely to operate in some cases with great injustice; but it cannot be denied that, in the case of some improvements, frontage is a very reasonable measure of benefits, much more just than value could be, and perhaps approaching equality as nearly as any estimate of benefits made by the judgment of men. However this may be, the authorities are well united in the

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Opinion of the Court—STILES, J.

conclusion that frontage may lawfully be made the basis of apportionment.”

Adopting these views, we do not see why we should disturb the charter provisions.

2. A general demurrer was sustained to the complaint in this case in the court below, and the appeal is from a judgment against the plaintiff entered thereon. The complaint shows that the authorities of the city of Seattle had, after proper proceedings, ordered the improvement of Broadway from the north side of Yesler avenue to De Forrest street by grading and constructing sidewalks on both sides of the same, and that they were about to issue certain bonds for the cost of the improvement, under the terms of the charter. The charter (art. 8, § 8) provides:

“There shall be two modes of making payment for such local improvements, to wit, ‘immediate payment’ and ‘payment by bonds,’ and the council shall, in the ordinance providing for such improvement, declare in which mode such payment shall be made. The mode to be adopted shall be by payment by bonds, except in case the owners of more than three-fifths of the number of the front feet of the property fronting on such street in the district shall petition for the other mode, at or before the passage of such ordinance, in which case the council shall adopt the mode petitioned for.”

And § 9 reads:

“If ‘payment by bonds’ is to be made for such improvement, then, and in such case, each estimate and roll shall be made and returned, and corrections made, and the notice given, as in the eighth section hereinabove provided, and the cost and expense of the improvement shall be assessed against the lots and parcels of land as in said section declared, payment for the crossing to be made as therein stated, and a copy of such roll filed with the city treasurer. But the ordinance shall further declare, on making such levy, that the sum charged against each lot and parcel of land may be paid in not more than ten equal annual payments, with interest upon the whole sum so charged at the

rate of seven per cent. per annum, the interest to be paid annually; and the city treasurer shall proceed to collect the amount due each year in the same manner as provided for collections in section eight hereof; and, in all cases of such payment by bonds, the city council shall issue the bonds of the city for the whole estimated cost of such improvement, less the costs of such crossings, and the amount assessed against lands of the United States, the State of Washington, state university, county of King, city of Seattle, or any school district. Such bonds shall be called 'Local Improvement Bonds, District No. —, of the City of Seattle;' shall be payable not more than ten years after date, with interest at a rate not exceeding six per cent. per annum, payable semi-annually at the office of the city treasurer. Such bonds shall be sold after thirty days' public notice thereof given, to the highest bidder therefor, but in no case shall such bonds be sold for less than par; and the proceeds shall be applied in payment of such improvement, the principal and interest of which bonds shall be paid by the city from proceeds of such local assessment, but the city shall be liable for the payment of both principal and interest; and all funds raised in each improvement district, as well as funds borrowed therefor, shall be paid into a fund for such district, to be called, 'Local Improvement Fund, District No. —, of Seattle.'"

As was premised, the city of Seattle has already passed the limit of one and one-half per cent. of her indebtedness, based upon the assessment roll of August 30, 1890, and no vote has been taken authorizing the increase of her indebtedness. The city council, by ordinance No. 1696, has provided for the issuance of Broadway improvement bonds in the sum of \$17,812.50; and the appellants contend that the city has no power, without a vote of authorization, to issue such bonds, for the reason that when issued they will constitute evidences of primary indebtedness of the city. The ordinance (§ 5) provides:

"The principal and interest of such bonds shall be paid by the city from the proceeds of such local assessments, but the city shall be liable for the payment of both princi-



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pal and interest if it fails or neglects to collect said assessments, or fails or neglects to collect sufficient to pay the principal or interest on said bonds when they fall due.”

For the city, it is claimed that the bonds when issued would not constitute primary indebtedness of the corporation, for the reason that they are payable out of the fund to be created under the terms of the charter, and that the ordinance makes the city liable only in case of its failure or neglect to collect the assessment, or to collect sufficient to pay the principal and interest of the bonds when they fall due. The appellant must succeed in his contention because the ordinance does not comply with the charter. The last clause of § 9 is, “and the city shall be liable for the payment of both principal and interest;” and the council has no power to issue a bond which does not provide for a liability equal in degree with that provided by the charter.

3. The main question, however, is whether in view of the city's indebtedness already exceeding one and one-half per cent., it can issue these bonds without a vote of the people. It is a rule established by many authorities, that when a municipal corporation is about to order improvements of this class it may do so without making itself primarily liable for the cost thereof. The city of Seattle has already done so to a large extent, and this court has held that the unpaid warrants issued by it, drawn upon and payable out of special assessment funds, do not constitute a part of its municipal indebtedness, within the meaning of the constitution (*Baker v. Seattle, ante*, p. 576), but it is competent for such a corporation to make itself primarily liable for such improvements, and to make their cost a part of its debt. In this instance the language of the charter is too clear for construction. It is evident therefrom that its framers intended to give a degree of strength and stability to improvement bonds by pledging the faith of

the city for their payment in the first instance. The bond-holder, under this charter, need look only to the city for the payment of his principal and interest; the city is to be his debtor, not the property within the district, nor the owner of the land. Upon this point learned counsel cited us to a line of authorities from the State of Indiana, and sought to rely upon them in support of his position, but an examination of the cases fails entirely, we think, to uphold him. The case of *Quill v. City of Indianapolis*, 124 Ind. 292 (23 N. E. Rep. 788), is the latest of the cases cited, and we shall examine that case, as well as the law upon which it was based, briefly. The constitution of that state (article 13) provides:

“No political or municipal corporation in this state shall ever become indebted, in any manner, or for any purpose, to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount, given by such corporation, shall be void.”

It was conceded that the bonded indebtedness of the city of Indianapolis exceeded the limit fixed by the constitution, and the question was whether it could, under the act of March 8, 1889, continue to issue improvement bonds; and the court held that, under the statute governing the issuance of the bonds proposed, they would not constitute a portion of the city's indebtedness, but would be valid obligations. But, turning to the statute in question, we find that no liability whatever was laid upon the city, even by its failure, neglect or refusal to collect the annual installments; but that the owner or holder of the bonds was given the right to foreclose the lien of the assessment upon the assessed property as a mortgage would be foreclosed in any court of competent jurisdiction, and for that purpose the bonds when issued were declared to transfer to the owner

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thereof all the right and interest of the city in and to the assessment and the lien thereby created. The effect of this statute seems to have been to make of each assessment district a *quasi* corporation, whose agent for the making of the improvement, the creation of the lien, and the issuance of the bonds was the city; but after the issuance of the bonds the city had no duty to perform other than that of paying over to the bond-holders the money which it might receive from time to time. This, it will be seen, is a case very broadly to be distinguished from the one at bar, and renders the authority of the Indiana case of no force. The case of the *United States v. Ft. Scott*, 99 U. S. 152, is one where the State of Kansas made a provision in the charter of cities of the second class, within which was the city of Ft. Scott, almost identical with that of the charter of the city of Seattle; and it was there held that the liability of the city was absolute without reference to the fact that it was authorized to levy special assessments for the payment of its improvement bonds, and intended, as a fact, that the bonds should be paid out of the assessments when collected.

Incidental to the further facts of this case, it appears that the appellant contends that the sum of \$955,000 of bonded indebtedness, which was incurred by the city of Seattle on the 20th day of August, 1890, for water and sewerage purposes, should in some way affect the question of the issuance of bonds in this case; but this claim is not warranted. The city was authorized by the act of February 26, 1890, to become indebted for the purpose of furnishing itself with water and sewerage and light plants in a sum equal to five per cent. of its assessment. This \$955,000, being issued for the special purposes under which the city is authorized by § 6, art. 8 of the constitution, to become indebted in a sum equal to five per cent. in addition to five per cent. of indebtedness authorized for general purposes, is not to be considered as constituting a

part of the general indebtedness of the city, inasmuch as its assessment in 1890 is shown to have been upwards of \$26,000,000, which would allow it a general indebtedness of upwards of \$1,300,000, and a special indebtedness for water, sewers and lights of as much more.

Again, it is charged that the Broadway improvement will exceed an expenditure of \$5,568.50 for the cost of the improvement at the intersection of cross streets, and therefore will add that much more to the city's indebtedness, but, so far as appears, the city may intend to pay that sum out of its current revenues, which will not, therefore, increase its indebtedness, in a constitutional sense, to that extent. If so, there is no objection on that ground to the improvement.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

ANDERS, C. J., and SCOTT, HOYT, and DUNBAR, JJ., concur.

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[No. 277. Decided August 10, 1891.]

HENRY REHMKE v. J. C. GOODWIN, M. HORAN AND J. W. RICHARDS, *the Board of County Commissioners of Kittitas County, Washington.*

#### COUNTIES—LIMITATION OF INDEBTEDNESS—BONDS.

The constitutional limitation (art. 8, § 6) on counties contracting indebtedness in excess of one and one-half per cent. of their taxable property without a vote therefor, applies to the total indebtedness of counties, whether contracted prior or subsequently to the adoption of the state constitution.

County commissioners are not authorized to submit to a vote the question of ratifying or validating county indebtedness incurred in excess of the one and one-half per cent. limitation; but, in order to validate additional indebtedness, there must be prior assent

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given thereto by a three-fifths vote at an election held for that purpose.

Under the act of March 21, 1890, county commissioners are authorized to issue bonds for the purpose of funding existing county indebtedness up to the one and one-half per cent. limit without submitting the question to a vote of the people.

*Appeal from Superior Court, Kittitas County.*

The facts are sufficiently stated in the opinion.

*Frost & Warner*, for appellant.

*D. H. McFalls*, for respondents.

The opinion of the court was delivered by

SCOTT, J.—In this action appellant seeks to enjoin the respondents, the board of commissioners of Kittitas county, from issuing the coupon bonds of said county in the sum of \$150,000, which bonds said board were attempting to negotiate and issue. The complaint was demurred to, and the demurrer was sustained, and judgment rendered dismissing the action. The purpose for which said bonds were to be issued was to fund the outstanding indebtedness of Kittitas county. The question of the issuance of such bonds was submitted to the voters of said county at the general election held on the 4th day of November, 1890, and more than three-fifths of the votes cast thereat in said county were in favor of such issuance. The injunction was sought mainly upon the grounds that the various proceedings had in submitting the matter to a vote were imperfect and irregular, and that the vote thereon was void in consequence thereof. The complaint does not sufficiently present the points which the parties now desire to have decided, but, to aid the same, it is conceded by the respondents in their brief, and upon the argument, that the amount of the bonds so proposed to be issued exceeded the amount of one and one-half per centum of the total

property valuation of said county as ascertained by the last preceding assessment for state and county purposes, and both parties concede that part of said indebtedness was incurred before, and a part since, the state constitution became operative.

In the case of *Murry v. Fay*, ante, p. 352, this court, in construing § 3 of the funding bond act (see page 38, Sess. Laws 1889–90), held that county commissioners could issue bonds to fund lawful county indebtedness incurred within the limitations of § 1 of said act, without submitting the question of issuing to a popular vote. In this case we do not know what per cent. the outstanding indebtedness is of the total property valuation, except that it is greater than one and one-half per cent. thereof, and it is also conceded to be less than five per cent.; nor do we know what the proportion of the then existing indebtedness to the property valuation was at the time the constitution went into effect that is now outstanding; or whether any of the present indebtedness was incurred prior to January 1, 1888. If any such remains in existence, it could yet be placed in the form of bonds by the commissioners under the provisions of the county bond act passed by the territorial legislative assembly in 1888 (see Sess. Laws 1887–88, p. 10), even if in excess of the one and one-half per cent., but within the amount there limited. We are also satisfied that the whole of the lawfully contracted indebtedness, whenever incurred, not now exceeding one and one-half per cent. of the total property valuation, can be converted into bonds by the commissioners under the provisions of the funding bond act aforesaid, approved March 21, 1890, without submitting the question to a vote of the people; in fact, there is no authority for holding any such election. It is evidently within the intention of that act to cover or include all lawful indebtedness, up to the one and one-half per cent., without any regard to the time when it was contracted.

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The indebtedness of this county, whatever it is, has apparently all been contracted by its commissioners without any vote of the people thereon; at least, it does not appear that any election has at any time been called or held to authorize the incurring of such indebtedness, or any part of it. It is contended by the respondents that the limitation contained in § 6, art. 8 of the state constitution, which provides that "no county . . . shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, . . . without the assent of three-fifths of the voters therein, voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness," has no reference to indebtedness contracted before the constitution became operative, and that the board of county commissioners had authority to incur indebtedness up to the one and one-half per cent. of such valuation in addition to such prior indebtedness, if any existed; but we do not agree with this contention. Of course, the constitution would not affect any prior indebtedness, but, if it amounted to one and one-half per cent. of the total property valuation, the commissioners would be powerless to contract any; if less than one and one-half per cent., then the commissioners were authorized to incur further indebtedness, not exceeding in amount the one and one-half per cent., including that in existence; otherwise the commissioners would be limited in expenditures for county purposes to a sum equal to the current revenue, unless an additional amount was authorized by a vote of the people as by law provided.

There was no law authorizing the commissioners to submit to a vote a question of ratifying or validating any pur-

ported indebtedness they had attempted to incur in excess of lawful limitation. They were empowered to submit a proposition to incur further indebtedness for county purposes, not exceeding five per cent. with the existing indebtedness, to a vote of the people, and, if three-fifths of the voters assented thereto, they could then contract it. In this case the vote was not taken to authorize them to incur further indebtedness, but to empower them to issue bonds for that existing, and also including an additional unauthorized amount which they had attempted to incur in excess of their authority. The vote thereon had no force, and the questions going to the regularity of the proceedings therein, are accordingly of no consequence, as the commissioners could have issued the bonds up to the one and one-half per cent. without a popular vote, and the vote in question could not validate their illegal acts wherein they had attempted to contract the excess. To have contracted any additional amount, they should have first submitted the matter to a vote, stating the amount required, and the purpose for which it was intended.

Upon the facts conceded, the judgment is reversed, and the court below is directed to overrule the demurrer, and proceed with the cause in accordance with this opinion.

ANDERS, C. J., and STILES, DUNBAR, and HOYT, JJ., concur.



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Sept. 1891.] Opinion of the Court—ANDERS, C. J.

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[No. 146. Decided September 21, 1891.]

DANIEL SULLIVAN v. SKAGIT COUNTY.

APPEAL—DISMISSAL—SURETIES ON BOND.

On a motion of appellee to affirm judgment on the ground of failure of appellant to file transcript and brief within the time prescribed by law, there can be no judgment against the sureties on the appeal bond, when no copy of the bond has been filed in this court.

*Appeal from Superior Court, Skagit County.*

*J. C. Haines*, for appellee.

The opinion of the court was delivered by

ANDERS, C. J.—This is a motion by appellee to affirm the judgment of the court below in this cause, and for damages, and for judgment against appellant and his sureties on the appeal bond for a failure to prosecute his appeal as required by law and the rules of this court. And it appearing that no transcript or brief has been filed as required by statute and by rule 6 of this court, and that the time for so doing has long since expired, and that appellee has caused to be filed in this court a certified copy of the judgment appealed from, together with a copy of the notice of appeal served, the judgment of the court below must be affirmed, with costs to appellee. But as no copy of an appeal bond has been filed with the papers in this case, no judgment against the sureties will be rendered herein.

DUNBAR, HOYT, SCOTT, and STILES, JJ., concur.

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[No. 243. Decided September 21, 1891.]

W. W. TINKHAM *et al.* v. D. E. KIMBLE *et al.*

APPEAL — DISMISSAL — JUDGMENT.

Upon affirming judgment of the court below against appellant for failure to prosecute his appeal after notice thereof duly served, and the filing of a *supersedeas* bond, this court will render judgment, unless sufficient excuse is shown for such failure against appellant and sureties on said bond for the amount of judgment and costs in the court below, and for costs in this court.

*Appeal from Superior Court, Skagit County.*

*E. C. Million*, for appellees.

The opinion of the court was delivered by

ANDERS, C. J.—On July 28, 1890, the complaint of appellants, who were plaintiffs in the court below, was dismissed, and a judgment for seventy-five dollars and costs rendered in favor of appellees, D. E. Kimble and Minerva Kimble; and on January 26, 1891, notice of appeal, with acceptance of service thereon, was duly filed by appellants. Appellee, D. E. Kimble, having filed in this court a certified copy of the judgment appealed from, together with the notice of appeal served, and a copy of the *supersedeas* bond, moves the court to dismiss the appeal and to affirm the judgment with damages, and for judgment against the sureties on the bond above mentioned, for the reason that appellants have failed and neglected to file a brief or transcript as required by law and the rules of this court.

Upon the hearing of the motion, of which due notice was given, appellants failed to appear and show cause why the motion should not be granted, or to give any reason or excuse for their non-compliance with the provisions of the statute and of rule 6 of this court.

The judgment of the court below must, therefore, be

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Sept. 1891.] Opinion of the Court—ANDERS, C. J.

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affirmed, and judgment will be entered in this court in favor of appellees, D. E. Kimble and Minerva Kimble, and against appellants and the sureties on the said *supersedeas* bond, for the amount of said judgment and costs, together with ten per cent. per annum interest thereon and costs in this court. See Code 1881, §§ 476, 477; *O'Hare v. Wilson*, 3 Wash. T. 251.

DUNBAR, HOYT, SCOTT, and STILES, JJ., concur.

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[No. 244. Decided September 21, 1891.]

W. W. TINKHAM *et al.* v. D. E. KIMBLE.

*Appeal from Superior Court, Skagit County.*

*E. C. Million*, for appellee.

The opinion of the court was delivered by

ANDERS, C. J.—Notice of appeal from the judgment of the court below was duly served and filed therein on December 18, 1890, since which time nothing whatever has been done by appellants by way of prosecuting their appeal except the filing of a *supersedeas* bond, which was done February 24, 1891. Appellee has caused to be filed in this court a certified copy of the judgment appealed from, together with a copy of the notice of appeal served, and of the *supersedeas* bond, and now moves the court to affirm the judgment of the superior court, with damages, and for judgment against the sureties on the said bond, for the reason that appellants have failed and neglected to file a brief or transcript as required by law, and the rules of this court.

The posture of this case is in all respects similar to that of *Tinkham v. Kimble*, *ante*, p. 682 (just decided by this

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Opinion of the Court—ANDERS, C. J.

[2 Wash.]

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court), and the decision therein rendered is decisive of this motion. The judgment of the court below is affirmed, and judgment will be entered here in favor of appellee and against appellants and the sureties on the said *supersedeas* bond for the amount of said judgment, together with interest thereon at the rate of ten per cent. per annum, and costs in this court. See Code 1881, §§ 476, 477; *O'Hare v. Wilson*, 3 Wash. T. 251.

DUNBAR, HOYT, SCOTT, and STILES, JJ., concur.

# **RULES OF THE SUPREME COURT OF THE STATE OF WASHINGTON.**

[Adopted November 2, 1891. In force from November 15, 1891.]

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## **RULE I.**

### **COURT RECORDS AND BOOKS.**

The clerk of the supreme court shall keep the following books and records :

1. Journal.
2. Record of opinions.
3. Appearance docket.
4. Motion docket.
5. Execution docket.
6. Fee book.
7. General index of cases.

8. In addition to the foregoing, the said clerk shall keep books in which shall be stated proper accounts of all moneys received and disbursed.

## **RULE II.**

### **DOCKET FEES.**

1. The clerk of the supreme court will not file any transcript until the appellant shall have deposited with him the sum of ten dollars as an advance docket fee, and he will not file any paper in any original motion, application or proceeding until the moving party shall have deposited a like sum for the same purpose.

## **RULE III.**

### **TRANSCRIPTS.**

1. Transcripts shall be prepared and filed with the clerk of the supreme court by clerks of the superior courts within sixty days after the giving of the notices of appeal, or the filing of the same, as the case may be.

2. In case the clerk shall be unable, for any reason, to prepare and file the transcript within the said period of sixty days, he may file the same at the earliest practicable date thereafter, in which case his certificate shall state the reason for his delay.

3. Every transcript shall be plainly written or printed on paper of good quality, of the size of legal cap, and be free from interlineations and erasures, and be duly paged, and prefixed with an alphabetical index to its contents, specifying the page of each separate paper, order or proceeding, and of the testimony of each witness, and have at least one blank fly leaf.

4. Every transcript consisting of more than fifty leaves shall be bound under the direction of the clerk of the supreme court at the expense of the appellant, and the cost of binding be taxed to the cause as other disbursements.

#### RULE IV.

##### TRANSCRIPTS — OMISSIONS.

1. If any paper or part of the record has been omitted from the transcript in any case, such omission may be supplied at any time before the cause is assigned for hearing by any party, without leave, by filing a properly certified transcript of such paper or part of the record with the clerk of the supreme court, and at the same time giving the opposite party notice thereof.

#### RULE V.

##### CLERK'S CERTIFICATE.

1. Transcripts must be certified by the clerk of the superior court in substantially the following form :

STATE OF WASHINGTON, ——— COUNTY, ss.

I, ———, clerk of the ——— superior court, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record in the above entitled cause as I am by statute required on appeal to transmit to the supreme court.

In testimony whereof I have hereunto set my hand and the seal of said superior court this ——— day of ———, 189—.

[SEAL.]

————, Clerk.

By ———, Deputy.

#### RULE VI.

##### TAKING PAPERS FROM CLERK'S OFFICE.

1. No paper filed with the clerk of the supreme court shall be taken from the court-room or clerk's office except by permission of the court or one of the justices, and when so taken a receipt in writing therefor must be left with the clerk. Permission to take papers will not be granted except to a party, or his attorney, who shall have entered an appearance in the supreme court in the cause in which such paper is filed.

#### RULE VII.

##### FILING AND SERVING OF BRIEFS.

1. Within thirty days after the filing of the transcript with the clerk of the supreme court, the appellant shall file with the clerk of this court his printed brief, and with it proof of the service of one copy of said brief upon the attorney or attorneys of each respondent who shall have appeared separately in the superior court.

2. Within thirty days after service of appellant's brief the respondent shall file his printed brief, with like proof of service of one copy of said brief upon the attorney or attorneys of each appellant who shall have appeared separately in this court.

3. The appellant shall have ten days in which to serve and file, in like manner, his printed reply brief.

4. No cause will be placed upon the calendar until the time for filing briefs has expired, unless the party entitled to such time shall waive the same in writing, filed with the clerk of this court.

5. When the last day for filing a brief falls upon Sunday or a legal holiday, it may be filed upon the next judicial day.

### RULE VIII.

#### CONTENTS AND STYLE OF BRIEFS.

1. Fifteen copies of each brief filed in a cause shall be delivered to the clerk on or before the day set for the hearing, for the use of the court and to be at its disposal. They shall be printed throughout in plain, clear type, and shall contain —

*First:* A clear statement of the case so far as deemed material by the party, with reference to the pages of the transcript for verification.

*Second:* The points taken, with the authorities cited thereon.

2. In citing authorities the names and numbers of volumes and the titles of cases must be clearly set out; and in citing text-books the number of the edition must be specified.

3. Briefs must be of the following dimensions, to wit: 8½ inches from top to bottom; 6½ inches from edge to edge, inclusive of the margin, which must be 1½ inches at the top, bottom and outer edge of each printed page. The title of the cause must be on the front cover and the first page in full.

### RULE IX.

#### ASSIGNMENT OF CAUSES.

1. For the purpose of hearings in the supreme court, causes from the several counties will be assigned as follows:

1. Spokane. 2. Stevens. 3. Whitman. 4. Lincoln. 5. Douglas. 6. Adams. 7. Okanogan. 8. Asotin. 9. Garfield. 10. Columbia. 11. Walla Walla. 12. Franklin. 13. Klickitat. 14. Yakima. 15. Kittitas. 16. Clarke. 17. Cowlitz. 18. Wahkiakum. 19. Skamania. 20. Pacific. 21. Chehalis. 22. Lewis. 23. Mason. 24. Thurston. 25. Pierce. 26. King. 27. Kitsap. 28. Jefferson. 29. Clallam. 30. Island. 31. San Juan. 32. Snohomish. 33. Skagit. 34. Whatcom.

2. Exceptions to this order may be made when public interests so require.

3. All causes in which briefs shall be on file ten days before a regular session of the court will be placed on the calendar of such session.

### RULE X.

#### CALENDAR.

1. As soon as the causes shall have been assigned for a regular session of the court, the clerk shall print a calendar thereof, and mail a copy of the calendar to each attorney or firm having any cause thereon.

**RULE XI.****ARGUMENTS.**

1. No more than two counsel on a side will be heard upon the argument of any question, unless the court shall direct otherwise: *Provided*, That each party who has appeared separately and by different counsel in the superior court shall, if he so desire, be heard through his own counsel. The counsel for the appellant shall be entitled to open and close the argument upon the merits in all cases. In argument of motions and all preliminary or collateral matters, the counsel for the party having the affirmative of the issue shall open and close. Arguments upon the merits shall be limited to one hour and a half upon a side, and all other arguments to one-half hour upon a side, unless an extension of time be obtained from the court before the argument is commenced.

**RULE XII.****ERRORS CONSIDERED.**

1. No alleged error or mistake of the superior court will be considered by the supreme court unless the same be clearly pointed out in the appellant's brief: *Provided*, That the objection that the complaint does not state facts sufficient to constitute a cause of action; that the answer does not state facts sufficient to constitute a counter-claim; that the superior court had no jurisdiction of the subject-matter of the action; and, that this court has no jurisdiction of the appeal, may be taken at any time.

**RULE XIII.****OPINIONS TO BE RECORDED.**

1. All opinions of the court shall be recorded by the clerk in a well bound volume, and the original filed with the papers in the case, and shall not be furnished by the clerk for publication until a copy in print or typewriting has been furnished the judge rendering the same, and been by him revised.

**RULE XIV.****REHEARINGS.**

1. Every petition for rehearing must be filed within thirty days after the opinion shall have been rendered; and no more than one petition for a rehearing of the same question shall be filed: *Provided*, That the court may, in its discretion, allow any petition to be amended. The filing of a petition for rehearing shall suspend the decision of the court until a ruling thereon.

**RULE XV.****EXPENSE OF BRIEFS TO BE TAXED AS COSTS.**

1. The necessary expense of printing briefs of the prevailing party shall be taxed as other costs.



**RULE XVI.**

**THE REMITTITUR.**

1. In all cases remanded, the clerk of the supreme court shall issue and transmit to the clerk of the superior court a remittitur; and in all cases wherein the judgment, order or decree of the superior court shall be reversed or modified, the remittitur shall be accompanied by a certified copy of the opinion of the supreme court in the case. Said remittitur shall be issued and transmitted at the expiration of thirty days from the filing of the opinion in cases where no petition for rehearing has been filed; and in cases where such petition has been filed, then within ten days after the denial of said petition.

**RULE XVII.**

**DISMISSAL ON SHORT RECORD.**

1. If the appellant shall fail to cause a transcript to be filed as provided in rule 3, the respondent may file a certified copy of the order or judgment appealed from, and of the notice served or journal entry of notice of appeal given, and on motion have the appeal dismissed, or the judgment or order appealed from affirmed: *Provided*, That when the failure to file the transcript is owing to the failure or omission of the clerk, or other circumstances over which the appellant had no control, the court will not dismiss the cause or affirm the judgment, as herein provided, but will fix such time for filing the transcript and briefs, and for hearing the cause, as shall insure a fair trial.

**RULE XVIII.**

**DISMISSAL FOR WANT OF BRIEF.**

1. Where the transcript has been filed but the appellant shall have taken no further step in the cause within the time limited for the filing of his brief, the respondent may move to dismiss or affirm, upon the record, and the court will dismiss or affirm, or order briefs to be filed and the cause to be heard upon such terms as may be just.

**RULE XIX.**

**SUBMISSION ON FAILURE TO APPEAR.**

1. Where a party does not appear when the cause is called for hearing, and the appeal has been perfected, and the brief of said party shall be on file, the cause, as regards such party, shall be deemed submitted. This rule shall not preclude oral argument by the opposite party.

**RULE XX.**

**RESPONDENT FILING NO BRIEF.**

1. Where the respondent fails to file a brief in the cause, the court will take the submission of the same by the appellant, and decide upon the merits of the appeal, if it shall appear to have acquired jurisdiction of the cause.

**RULE XXI.****SPECIAL APPEARANCES.**

1. Any party to a cause pending in the supreme court who shall, in person, or by attorney, file a brief or any paper in the cause without at the same time affirmatively, by written or printed notice to the opposite party or the court, make a limited or special appearance in the cause, shall be held to have entered a general appearance in the supreme court, and to have waived all objections to the jurisdictional process on the appeal.

**RULE XXII.****MOTIONS—HOW MADE AND HEARD.**

1. Motions to strike out any portion of the transcript, or to dismiss or affirm upon the record, and all technical motions tending to prevent the hearing of a cause upon its merits, must be made and plainly stated in the respondent's brief, and will be heard at the time the cause is assigned upon the calendar.

2. All other motions in appealed causes must be made in writing, and noticed for some Friday of the session at the opening of court on that day. These will be known as *noticed motions*.

3. At least two days before the day set for the hearing of such a motion, the motion and notice, with proof of service thereof, must be filed with the clerk. The clerk will prepare a calendar of noticed motions for each Friday, in the order of their filing, and they will be given precedence of other hearings on that day.

**RULE XXIII.****NOTICES OF MOTION.**

1. All notices of motion not given in the briefs must be in writing; and the necessary time of notice shall be ten days, unless a different time is fixed by statute or the special order of this court. But where the service of a notice is made by mail between different places, the time of notice above mentioned shall be thirteen days.

2. Service of papers must in all cases be made upon the attorney of record of a party, if he have one, unless the place of business or residence of such attorney is unknown, when it may be made upon the party.

**RULE XXIV.****SERVICE OF PAPERS.**

1. Service of papers may be as follows:

*First:* If upon an attorney, by delivering to him personally, or at his office by delivery to his clerk or to the person having charge thereof; or if his office be not open, or there be no one in charge thereof, at his residence by delivery to some person of suitable age and discretion; or, if neither of the foregoing methods can be followed, by deposit in the postoffice to his address, with postage prepaid.

*Second:* If upon a party, by delivery to him personally, or at his residence, by delivery to some person of suitable age and discretion, between the hours of 9 o'clock in the forenoon and 9 o'clock in the evening.

**RULE XXV.**

**SERVICE — RESIDENCE UNKNOWN.**

1. Where the residence of a party and of his attorney of record, if he have one, is not known, the service may be made upon the clerk of the superior court in which the cause was tried, for the party or attorney.

**XXVI.**

**SERVICE BY MAIL.**

1. Service may be made by mail when the person making the service and the person on whom such service is to be made reside in different places, between which there is regular communication by mail; postage must in such cases be prepaid.

2. Time shall begin to run from the date of deposit in the post-office.

**RULE XXVII.**

**HABEAS CORPUS.**

1. Judges of the supreme court, when applied to for writs of *habeas corpus*, shall make the same, if granted, returnable before the superior court of the county where the person detained is alleged to be, or before a judge of said court.

2. Upon such an application, however, the judge applied to may make an order to show cause why the writ should not issue returnable before the supreme court.

3. Unless there be special reasons to the contrary, writs of *habeas corpus* will be issued by the supreme court only after a hearing upon an order to show cause.

4. In all cases where the person whose release is sought to be obtained by original *habeas corpus* from this court is imprisoned in the penitentiary, or in a county jail, upon a charge or conviction of felony, service of the order to show cause and petition must be made upon the warden or sheriff, as the case may be, the prosecuting attorney of the county from whence the prisoner was committed, or in which he is confined, and the attorney-general at his office in Olympia.

5. Where the imprisonment is in a county jail upon a charge or conviction of misdemeanor the service must be upon the prosecuting attorney and sheriff of that county.

**RULE XXVIII.**

**OTHER ORIGINAL WRITS.**

1. In all other cases of applications to the supreme court for original writs, under either its original or its appellate jurisdiction,

the applicant shall show notice to the opposite party or his attorney of record of his intention to apply for such writ and the time thereof, or furnish satisfactory reasons by affidavit for his failure to give such notice.

2. The notice above required shall not be less than four nor more than fourteen days. Applications under this rule must be made on Friday unless there be some special emergency requiring earlier action.

3. The opposing party shall be at liberty to make any objections he sees fit upon the face of the papers presented with the application.

4. Upon the final hearing of any application under this rule, each side shall furnish for the use of the court seven written or printed copies of their points and authorities.

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## ADMISSION OF ATTORNEYS.

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### RULE I.

#### NON-RESIDENT ATTORNEYS.

1. Any person who shall have been admitted as an attorney and counselor of the highest court of record of another state or of a territory of the United States, may be admitted upon proof, by his own affidavit filed with the clerk of the court to which he applies, showing his full name, age and residence, and that he is a citizen of the United States; and such affidavit shall further show the court of other states to which the affiant has been formally admitted, and the dates of such admission, and that he is not under any judgment of disbarment or suspension from practice in such courts. The applicant shall produce to the court at the time of presentation of his application a certificate of his admission to practice in the highest court of record of the state from which he comes, under the hand of its clerk and attested by its seal; and the affidavit of at least two members of the bar of the court to which he applies, to the effect that they believe him to be a person of good moral and professional character.

### RULE II.

#### GRADUATES OF LAW SCHOOLS.

A graduate of a law school which is authorized by the laws of the state (within the United States) wherein it is located to issue diplomas of graduation, and where the course of study is not less than two years, may be admitted upon proof, by his own affidavit filed with the clerk of the court to which he applies, showing his full name, and that he is a resident of this state, a citizen of the United States, is over the age of twenty-one years, and is a graduate of a law school of the kind above mentioned. The applicant shall

produce to the court, at the time of presenting his application, his diploma of graduation, and the affidavit of at least two members of the bar of the court to which he applies, to the effect that they believe him to be a person of good moral character.

### RULE III.

#### EXAMINATION DAYS.

The third Friday of each regular session of the supreme court is fixed as the day upon which applicants for admission upon examination will be examined in the supreme court.

Each judge of a superior court in the state will, by rule, fix not less than three days in each year upon which applicants for admission upon examination will be examined in the county or counties over which he presides.

### RULE IV.

#### FILING APPLICATIONS.

Applications for admission upon examination must be filed with the clerk of the court to which they are addressed, at least one week before the day of examination.

Such applications shall be accompanied by the affidavit of the applicant, showing his full name; that he is a resident of this state, a citizen of the United States, and over the age of twenty-one years; that he has diligently studied the common law and the laws of this state for at least eighteen months previous to the date of his application, under the direction of a practicing attorney within this state, naming the said attorney, and giving his residence if known; and that he has not been examined for admission and been rejected in any court in this state within six months. And the applicant shall also file the affidavit of the said attorney, corroborating the facts in regard to his period of study (or fairly excuse the absence of the same), and the affidavits of two members of the bar of the court to which he applies, to the effect that they believe him to be a person of good moral character.

### RULE V.

#### EXAMINERS.

Examinations in the supreme court will be conducted by the judges thereof, and such members of the bar as they may designate to assist them.

Examinations in the superior courts will be conducted by the judges of those courts, and two members of the bar of their respective courts who shall be designated to assist them at each examination.

### RULE VI.

#### EXAMINATIONS.

Examinations shall be of two kinds — written and oral, and shall be based upon the subjects embraced in the following schedule :

1. The Constitution and Code of Washington.
2. Code Pleading and Practice.
3. Equity Jurisprudence—Story.
4. Evidence—Greenleaf.
5. Blackstone's and Kent's Commentaries.
6. Contracts—Bishop.
7. Real Property—Boone.
8. Constitutional Limitations—Cooley.

### **RULE VII.**

#### **WRITTEN EXAMINATIONS.**

The examiners shall prepare and submit to the applicant twenty-five numbered questions in writing, to be answered in writing.

While engaged in answering the questions the applicant shall be in a room free from interruption, and shall be upon honor not to communicate with any person, or to read any book or paper upon the subject of the answer to any question submitted to him.

Six hours will be allowed in which to prepare the written answers. The question with its number shall precede each answer. Each page of answers shall be signed by the applicant.

Immediately upon concluding his written answers the applicant shall deliver them to the examiners.

### **RULE VIII.**

#### **ORAL EXAMINATIONS.**

Upon the day following the applicant's written examination he shall be examined orally in open court by the examiners at such length as they may deem proper.

### **RULE IX.**

#### **ADMISSION UPON EXAMINATION.**

As soon as their convenience will permit, the examiners shall satisfy themselves from the applicant's written and oral examinations and his affidavits on file whether or not he should be admitted, and announce the result. Unless a majority of the examiners favor his admission he will not be admitted.

### **RULE X.**

#### **FEES.**

Upon the admission of any person to practice under these rules he shall pay to the clerk of the court where he is admitted, the sum of five dollars in full for all fees, for filing his application and affidavits, the entry of his admission, and a certificate of the same, which sum shall be accounted for by the clerk as other fees.

### **RULE XI.**

#### **PRACTICE.**

Admission to practice in the supreme court shall entitle an attorney to practice in all the courts of the state.

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Admission in a superior court shall entitle an attorney to practice in all the courts of the state except the supreme court; but upon filing the certificate of a clerk of a superior court, attested by the seal of that court, showing that he is a member of the bar of that court, regularly admitted and then in good standing, together with his own affidavit that he is not under the judgment of disbarment or suspension of any superior court of this state, the supreme court will admit such attorney to practice therein.

**RULE XII.**

**DISBARMENT AND SUSPENSION.**

The judgment of disbarment or suspension of the supreme court, or of any superior court of this state, shall disqualify any attorney against whom the same is pronounced from practicing as an attorney in any of the courts of the state until the same shall be reversed or vacated; and any attorney who, while so disbarred or suspended, shall practice as an attorney, shall be deemed guilty of a contempt, and punished accordingly.

**RULE XIII.**

**RULES TO BE EXCLUSIVE.**

The foregoing special rules shall be the exclusive rules for the admission of attorneys to practice in the courts of this state: *Provided*, That nothing in these rules shall prevent any of the courts of this state from allowing any person to plead his own cause, or from allowing any person who the court may be satisfied is an attorney in good standing in another state to assist in the trial of any cause which may be on trial before it.





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# INDEX.

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**AMENDMENT.** See **PLEADING**, 1.

**APPEAL AND ERROR.**

1. *Defective Record—Cured by Admissions in Brief and Argument.*

Where the record shows the motion to strike out certain allegations of an answer, but fails to show the order of the court thereon, or that any exception was taken thereto, appellant's admission in his brief and upon the argument in this court that the motion was granted, must be taken as true, coupled, however, with the statement that the order was excepted to. — *Pettygrove v. Rothschild*, 6.

2. *When Lies Without Exceptions Taken.*

Where judgment is given on the pleadings in an equity case, an appeal may be maintained therefrom, though no exception is taken. — *Travis v. Ward*, 30.

3. *Interlocutory Order—Attachments.*

An order of the superior court discharging an attachment is not reviewable on appeal under the laws of this state for the removal of causes to the supreme court (Laws 1889-90, pp. 333, 336). — *Windt v. Banniza*, 147.

4. *Record—Affidavits in Attachment not Part of.*

Affidavits used upon the hearing of a motion to discharge an attachment are not part of the record, and, in order to be available on appeal, must be brought up by a statement or bill of exceptions. — *Id.*, 147.

5. *Order of Arrest in Civil Actions—Not Appealable.*

An order of arrest in civil actions is not a special proceeding, but is a provisional remedy, merely ancillary to the action in which it is invoked, and consequently not appealable under the act (Laws 1889-90, pp. 333, 336) providing that "an appeal may be taken to the supreme court from the superior courts in all actions and proceedings," as the term "proceedings" embraces only special proceedings, as distinguished from ordinary actions at law. — *Cline v. Harmon*, 155.

## APPEAL AND ERROR (Continued).

6. *Findings by Court—When Sufficient.*

A finding by the court stands as a special verdict, under Code 1881, § 247, and, unless so clearly unfounded that it would be set aside if made by a jury, will not be disturbed. — *Reynolds v. Dexter Horton & Co.*, 185.

7. *Substituted Statement of Facts—When Considered.*

A statement of facts will be considered by the supreme court, where the record shows that it was agreed upon by the attorneys of both parties to the action, certified by the judge, and by an order of the court substituted for an original statement which had been lost. — *Squire v. Greer*, 209.

8. *Failure to Perfect Appeal—Dismissal.*

Where an appeal is not perfected within the time prescribed by law and the rules of the supreme court, the appeal will be dismissed unless a reasonable excuse is shown for the failure. — *Murphy v. Ross*, 327.

9. *Notice of Appeal—Upon Whom Served.*

Where the decree in an action is such that several of the defendants, who do not join in an appeal, are prevailing parties as against those who do, notice of appeal should be served on those not joining, under the act of March 22, 1890, providing that a party desiring to appeal must serve notice on the prevailing party. — *Jones v. Sander*, 329.

10. *Referee's Findings—Presumption in Absence of Evidence.*

On the appeal of an action tried before a referee, the supreme court will assume, in the absence of the evidence, that the facts found by the referee are true, and that the evidence warranted the findings. — *Ferry v. King County*, 337.

11. *Dismissal—Failure to File Transcript and Briefs.*

Where appellant fails to cause a transcript to be prepared, and to serve and file a brief as required by rule 6 of the supreme court, without satisfactory excuse for the failure, the appeal will be dismissed on appellee's motion therefor, accompanied by a certified copy of the judgment and notice of appeal. — *Higgins v. Burns*, 372.

12. *Same.*

Where appellant fails to file a transcript and to serve and file a brief as provided by law and the rules of this court, and gives no reason or excuse for such failure, the appeal will be dismissed. — *Edison Electric, etc., Co. v. Needham*, 450.

13. *Erroneous Exceptions—Equity Cases—Harmless Error.*

On appeal in a proceeding in equity, the supreme court looks at the substance of the case as presented below, and not at any technical exceptions or objections made therein; exceptions which might be erroneous in an action at law will not be regarded as error in a proceeding in equity. — *Smith v. Taylor*, 422.

14. *Appealable Order—Vacating Judgment.*

An order vacating a decree on petition of a party who had been served with process in the proceeding by publication only, and allowing her to appear and defend the action, is not an appealable order under Laws 1889-90, p. 336, amending § 1 of the act passed March 22, 1890, relating to removal of causes from the superior to the supreme court. — *Sander-Boman Co. v. Yesler's Estate*, 429.

15. *Record—Exhibits in Equity Cases.*

In causes of equitable cognizance, the original exhibits should be sent up on appeal, and not copies thereof. — *State ex rel. Quade v. Allyn*, 470.

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APPEAL AND ERROR (Continued).16. *Review—Motion for New Trial Unnecessary.*

Under Code 1188, § 450, the supreme court may review and reverse on appeal any judgment of the superior court, although no motion for a new trial was made in such court. — *Johnson v. Maxwell*, 482.

17. *Statement of Facts not Certified.*

A statement of facts not certified by the trial judge will not be considered by the supreme court. — *Hanson v. Tompkins*, 508.

18. *Statement of Facts—Notice of Settlement—Jurisdictional.*

Where the record on appeal does not disclose that notice of settlement of the statement of facts included therein was given appellee, nor that there was a waiver thereof, and there is no appearance by appellee in this court, the purported statement will be disregarded. The notice required to be given the opposite party for the settlement of a statement on appeal is jurisdictional, and there can be no presumption in favor of its having been given, or waived. — *Mooney v. State*, 487.

19. *Statement of Facts—Trial Judge out of Office—By Whom Settled.*

Under Laws 1889-90, p. 334, § 4, a statement of facts on appeal cannot be settled by the judge who tried the cause after he goes out of office, as there is nothing in the statute specially providing that judicial functions shall be retained for such purpose. — *Faulconer v. Warner*, 525.

20. *Failure to File Transcript After Notice—Excuse.*

Where the court in a cause of equitable cognizance delivered his findings and decree to the clerk to be filed, and defendant thereupon gave notice in open court of appeal, and ordered and paid for a transcript, which the clerk failed to prepare and file within thirty days thereafter, on the ground that he had not entered the decree because plaintiff had not paid the fees therefor, no laches can be attributed to the defendant. — *Callahan v. Houghton*, 539.

21. *Weight of Testimony.*

Where there is sufficient evidence to sustain the verdict of the jury, the supreme court will not pass upon the weight of testimony. — *Lybarger v. State*, 552.

22. *Amended Record—Rehearing.*

The supreme court will, on suggestion of a diminution of the record of a case before the court, order the record supplied; but after appellant has rested his case on certain points of the record, he will not be granted a rehearing upon an amended record. — *Id.*, 552.

23. *Record—Presumptions.*

Where the evidence in a cause is not made a part of the record on appeal, it will be presumed that the findings of fact by the court below were warranted by the evidence. — *Rathbun v. Thurston County*, 564.

24. *Appeal Bond—Judgment Against Sureties.*

The supreme court will not render judgment against the sureties on an appeal bond, under Code 1891, § 1432, where the bond secures to appellee the payment of all rents or damages to property during the pendency of the appeal, unless such damages can be known without an issue and trial. — *Muzzy v. Tompkinson*, 616.

25. *Weight and Sufficiency of Evidence.*

In an action by an architect to recover for services, the refusal of the court to set aside a verdict for plaintiff, on the ground that the evidence fails to show any employment of the architect by defendant, is not error, when both parties testified fully and there was a direct conflict in their testimony, as it is for the jury to determine, under all the facts and circumstances before them, upon which side lay the preponderance of evidence. — *Noyes v. Pugin*, 653.

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**APPEAL AND ERROR (Continued).**
**26. Dismissal—Appeal Bond—Judgment Against Sureties.**

On a motion of appellee to affirm judgment on the ground of failure of appellant to file transcript and brief within the time prescribed by law, there can be no judgment against the sureties on the appeal bond, when no copy of the bond has been filed in this court. — *Sullivan v. Skagit County*, 681.

**27. Dismissal for Failure to Prosecute Appeal—Judgment upon Supersedeas Bond.**

Upon affirming judgment of the court below against appellant for failure to prosecute his appeal after notice thereof duly served, and the filing of a *supersedeas* bond, this court will render judgment, unless sufficient excuse is shown for such failure against appellant and sureties on said bond for the amount of judgment and costs in the court below, and for costs in this court. — *Tinkham v. Kimble*, 682.

See CRIMINAL LAW, 1, 3, 10, 11, 12, 13; JURY, 3; JUSTICE OF THE PEACE, 2; MANDAMUS, 1; PROHIBITION, WRIT OF, 3.

**ARGUMENTS OF COUNSEL.** See TRIAL, 2.

**ARREST.** See APPEAL AND ERROR, 5.

**ASSAULT.** See CRIMINAL LAW, 11; HOMICIDE, 3; RAPE, 1, 2.

**ASSIGNMENT FOR BENEFIT OF CREDITORS.** See INSOLVENCY, 1, 2, 3.

**ASSUMPSIT.** See DAMAGES, 7; EVIDENCE, 9.

**ATTACHMENT.****1. Motion to Vacate—Jury Trial.**

A motion to discharge an attachment is addressed to the consideration of the court or judge, and the statute of this state (Laws 1885-6, p. 45) does not contemplate the interposition of a jury to determine it, or to aid in its determination. — *Windt v. Banniza*, 147.

**2. Motion to Vacate—Oral Testimony.**

When the motion to discharge an attachment is made by defendant upon affidavits, the plaintiff may oppose the same by affidavits or oral testimony; but the defendant has no right, in the first instance, to introduce any testimony other than affidavits in support of his motion. — *Id.*, 147.

**3. Motion to Vacate—By One of Several Defendants.**

An attachment may be dissolved upon the motion and affidavit of but one of several defendants. — *Id.*, 147.

**4. Insufficiency of Affidavit.**

A motion to discharge an attachment on the ground of the insufficiency of plaintiff's affidavit therefor, should point out explicitly the nature of the insufficiency. — *Id.*, 147.

**5. Debts not Due—When Writ Granted.**

Under the statute (Laws 1885-6, p. 39, § 3) allowing attachment upon claims not yet due, when the debtor has fraudulently disposed of his property, the plaintiff must allege such fraudulent disposition in his complaint, and, in case of denial, prove the same upon the trial, in order to authorize a judgment in his favor. — *Cox v. Dawson*, 381.

**ATTACHMENT (Continued).****6. Same—Denial of Fraud—Judgment Without Proof of Fraud.**

In an action upon a note not yet due, where the allegations of the complaint, that defendants have disposed of their property with intent to delay and defraud creditors, and that they are about to depart from the state without making any provision for payment of the note, are denied by the answer, and no proof is offered at the trial in support of such allegations, judgment for plaintiff is unauthorized. — *Hanson v. Tompkins*, 508.

See APPEAL AND ERROR, 3, 4; INSOLVENCY, 1.

**ATTESTATION.** See EVIDENCE, 3, 4, 5.

**ATTORNEY AND CLIENT.** See CONTEMPT; CONTINUANCE; MORTGAGES, 2; TRIAL, 2.

**BONDS.****Action on Bond of County Treasurer—Findings.**

In an action on the bond of a county treasurer, the findings by a referee that the principal defendant was the duly elected and qualified treasurer of the county at the time complained of; that he and his sureties executed the bond described in the complaint; that while acting as such county treasurer, he received for the use of said county divers large sums of money, and that he did not account to the proper authorities for all the money so received by him; and that through mistakes and errors on the part of said treasurer, the auditor and the board of county commissioners, said treasurer did not pay over to his successor in office a certain sum out of the moneys received by him as treasurer for the use of said county, are sufficient to justify the conclusion of law by the referee that plaintiff was entitled to judgment against the defendants for said sum of money not accounted for. — *Ferry v. King County*, 337.

See APPEAL AND ERROR, 24, 26, 27; COUNTIES, 2, 4; MUNICIPAL CORPORATIONS, 11, 12, 13, 14, 17.

**BOUNDARIES.****1. Courses in Deed—Presumptions—Rebuttal by Evidence.**

Where a deed describes the land conveyed as commencing at a point west of the northeast corner of a certain section, the presumption is that the point is due west, although the north line of the section is not on the true meridian; but such presumption may be rebutted by extraneous testimony. — *Reed v. Tacoma Building and Savings Association*, 198.

**2. Same—Intention of Parties—Parol Evidence.**

Where a grantor conveys lands, describing them according to government survey, the presumption is that the deed conveys all the land within the subdivisions described, according to the actual survey; but parol evidence is admissible to show the intention to convey a certain definite piece of land, and that the parties were mistaken in the location of the government line. — *Squire v. Greer*, 209.

**3. Government Surveys—Not to be Corrected by Courts.**

A court cannot correct the government surveys and establish government corners at points other than the points located by the government; but its investigation must be directed towards ascertaining the fact where the government corners are actually established, not where they ought to be. — *Id.*, 209.

**BRIEFS.** See **APPEAL AND ERROR**, 1, 11, 12, 26.

**BROKERS.** See **FACTORS AND BROKERS**.

**BURDEN OF PROOF.** See **SALE**, 4.

**CARRIERS.** See **NEGLIGENCE**, 2, 3, 4, 5.

**CERTIORARI.** See **MUNICIPAL CORPORATIONS**, 3.

**CHARTER.** See **CONSTITUTIONAL LAW**, 1; **EMINENT DOMAIN**, 2;  
**INTOXICATING LIQUORS**, 1; **MUNICIPAL CORPORATIONS**, 1, 4, 6.

**COMMUNITY PROPERTY.** See **DIVORCE**, 1, 2; **HUSBAND AND WIFE**, 1, 2.

**CONFLICT OF LAWS.**

*Commerce and Navigation—State and National Laws.*

The rights of the state in tide lands are subject to the paramount right of the United States to regulate commerce and navigation; consequently, the United States, by its proper officers, is the only party that can interfere in case of state legislation being opposed to that of congress upon the subject of navigation and harbor lines; and, until the contrary appears, all such legislation must be presumed to be in the interest of commerce and navigation.—*Harbor Line Commissioners v. State*, 530.

**CONSIDERATION.** See **EQUITY**, 2; **FRAUDS, STATUTE OF**; **VENDOR AND VENDEE**.

**CONSTITUTIONAL LAW.**

1. *Limitation on Territorial Legislature—Special Laws Incorporating Cities.*

The special act of the territorial legislature of Washington (Laws 1869, p. 437), incorporating the city of Seattle, does not come within the prohibition of the organic act (Rev. St. U. S., § 1889) against granting private charters or special privileges, as such act of incorporation is the grant of a public charter.—*Alger v. Hill*, 344.

2. *Legislative Powers—Creation of Inferior Courts.*

The power conferred upon the legislature by the constitution to create additional inferior courts is not one of its original inherent powers as the supreme legislative body of the state, but is a delegated power which must be exercised in the manner pointed out, and cannot be again delegated. Such inferior courts can only be created by express enactment of the legislature.—*In re Cloherty*, 137.

3. *Ex Post Facto Law—Informations.*

A law changing the mode of procedure in prosecutions for crime from an indictment to an information, does not contain any of the elements, or respond to any of the accepted definitions of an *ex post facto* law, although the offense under prosecution may have been committed prior to such change in the law.—*Lybarger v. State*, 552.

4. *Special Legislation—Curative Acts.*

The act of March 7, 1891, providing for an election for the validation of warrants issued in excess of the one and one-half per cent. limit by any city or town having a corporate existence in the state is not unconstitutional on the ground of special legislation, but is a curative act, applicable only to what had been done before the date of its passage.—*Baker v. Seattle*, 576.



CONSTITUTIONAL LAW (Continued).

5. *Municipal Indebtedness—Ratification—Antecedent Vote Unnecessary.*

As the language of the constitutional provision permitting cities to incur an indebtedness up to five per cent. of their taxable property, when authorized by the legislature, is not certain to the effect that the legislature must provide that the three-fifths vote of the citizens therefor shall be an antecedent one, the act of March 7, 1891, authorizing elections to ratify existing municipal indebtedness in excess of the one and one-half per cent. limit, is not unconstitutional. — *Id.*, 576.

6. *Uniform Taxation—Street Improvements—Assessments According to Frontage.*

Article 8, § 7 of the charter of the city of Seattle, adopted in 1890, providing that the cost of improving streets in said city shall be assessed upon the lands benefited thereby in proportion to their frontage upon the improvement, is not in violation of the constitutional provision that taxes shall be according to value, and shall be equal and uniform. — *Austin v. Seattle*, 667.

See CONFLICT OF LAWS; COUNTIES, 1, 3, 5; CRIMINAL LAW, 1; HABEAS CORPUS, 2; MUNICIPAL CORPORATIONS, 1, 6, 15, 16; RIPARIAN RIGHTS, 7; STATUTES, 1.

CONTEMPT.

*Extent of Punishment—Suspending Attorney.*

Where the superior court has fined an attorney for contempt and entered an order suspending the attorney from practice in that court until he has purged himself of the contempt by apologizing, the supreme court can intervene by *mandamus* to compel said court to vacate and set aside the order of suspension. — *State ex rel. Rohde v. Sachs*, 373.

CONTINUANCE.

*Absence of Attorney.*

The refusal of the superior court to grant defendant a continuance on account of the absence of its principal counsel, who, it was rumored, had been drowned, is not such an abuse of discretion as to justify a reversal of the judgment in a cause, especially where defendant was represented by other attorneys, and had proceeded to trial with the expectation that such counsel would arrive before any material progress had been made in the cause before continuance was asked for. — *Skagit Railway and Lumber Co. v. Cole*, 57.

CONTRACTS.

*Contract of Employment.*

In an action by plaintiff to recover for services in superintending the construction of defendant's buildings, where plaintiff makes no definite statement of the manner of his employment by defendant, and the evidence shows that plaintiff was under contract with defendant's architects at a stipulated price per day to superintend the construction of certain buildings, including those of defendant, and that defendant was to make up to the architects any deficiency that might exist in plaintiff's wages after the architects had appropriated therefor a certain per cent. they were to receive on the other buildings, a judgment for plaintiff is unwarranted. — *Cadwell v. Brackett*, 321.

See CORPORATIONS; DAMAGES, 2, 3, 5, 7; ESTOPPEL, 2; EVIDENCE, 2, 9; SALE, 1; SPECIFIC PERFORMANCE, 1, 4, 5.

## CORPORATIONS.

### *Contract—Ratification.*

Where a mortgage by a corporation was not authorized by its trustees, but was executed by its president and secretary, who were two of its three trustees, and the corporation received the benefits of the mortgage, the defects in its original execution will be regarded as cured by ratification. — *Dexter Horton & Co. v. Long*, 435.

## COSTS AND FEES.

### 1. *Costs in Criminal Cases—Stenographer's Fees—Liability of County.*

The county commissioners cannot be compelled, for the benefit of the accused in a criminal prosecution, to pay for a copy of a stenographer's report of the trial. — *Stowe v. State*, 124.

### 2. *Costs in Criminal Cases—Transcript—Pauper Defendant.*

A person convicted of murder is entitled, on appeal, to a transcript of the record at the expense of the public on showing that he is without means and unable to pay the clerk's fees therefor. — *State ex rel. Coella v. Fenimore*, 370.

See CRIMINAL LAW, 1; JUDGMENT, 8; JUSTICE OF THE PEACE, 3.

## COUNTIES.

### 1. *Board of Commissioners—Powers not Judicial.*

Under the organic act of the Territory of Washington (Rev. St. U. S., § 1907), boards of county commissioners could not be clothed with judicial powers, even by act of the legislature, and the power exercised by said boards in making settlements with county treasurers is of a ministerial character, and not binding upon the county. — *Ferry v. King County*, 337.

### 2. *Indebtedness—Issue of Bonds Without Vote—Funding Indebtedness.*

Under the act of March 21, 1890 (Laws 1889-90, p. 37), the board of county commissioners of any county can issue bonds of the county for the funding of outstanding warrants without a vote of the people of the county, where the amount of the existing indebtedness of said county is less than one and one-half per centum of the taxable property of said county, as ascertained by the last assessment for state and county purposes. — *Murry v. Fay*, 352.

### 3. *Limitation of Indebtedness—When Contracted.*

The constitutional limitation (art. 8, § 6) on counties contracting indebtedness in excess of one and one-half per cent. of their taxable property without a vote therefor, applies to the total indebtedness of counties, whether contracted prior or subsequently to the adoption of the state constitution. — *Rehmke v. Goodwin*, 676.

### 4. *Funding Indebtedness—Issuance of Bonds—When Vote Unnecessary.*

Under the act of March 21, 1890, county commissioners are authorized to issue bonds for the purpose of funding existing county indebtedness up to the one and one-half per cent. limit without submitting the question to a vote of the people. — *Id.*, 676.

### 5. *Validating Indebtedness Exceeding the One and One-half Per cent. Limit—Prior Assent Necessary.*

County commissioners are not authorized to submit to a vote the question of ratifying or validating county indebtedness incurred in excess of the one and one-half per cent. limitation; but, in order to validate additional indebtedness, there must be prior assent given thereto by a three-fifths vote at an election held for that purpose. — *Id.*, 676.

See BONDS; COSTS AND FEES, 1, 2; ESTOPPEL, 1.

COURTS. See CONSTITUTIONAL LAW, 2; CONTEMPT; MUNICIPAL CORPORATIONS, 1, 2.

## CRIMINAL LAW.

### 1. *Appeal—Paying Costs Before Final Judgment.*

The constitutional provision (art. 1, § 22) that "in no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed," has reference to the final judgment of the trial court, and not of the supreme court. — *Stowe v. State*, 124.

### 2. *Separation of Jury—After Agreeing on Verdict.*

The separation of the jury in capital cases, after the case is finally submitted to them and before rendering their verdict, is error, though the verdict may have been signed and sealed before separation, and defendant's counsel may have consented thereto; the provisions of § 1089, Code 1881, only authorize the separation of juries during the progress of the trial. — *Anderson v. State*, 183.

### 3. *Appeal—Affidavits Used on Application for New Trial.*

Under Laws 1885-6, p. 70, § 1, subd. 7, affidavits in support of a motion for a new trial are part of the record, and will be considered on appeal without any statement of facts or bill of exceptions being settled. — *Id.*, 183.

### 4. *Information—Defendant's Name Omitted from Charging Part.*

Under the statute of this state (§ 1004, Code 1881) an information which omits the name of the defendant from the charging part, but names him in the accusing part of the information, is sufficient. — *Whitcher v. State*, 286.

### 5. *Change of Venue—Discretion of Court.*

Under § 1073, Code 1881, vesting the matter of a change of venue in a criminal case entirely in the discretion of the trial court, the supreme court will not reverse a conviction, unless the discretion has been most clearly abused. — *Edwards v. State*, 291.

### 6. *Evidence—Accomplice as State's Witness.*

It is not error, under § 1092, Code 1881, to allow one indicted with the prisoner, but not put upon trial with him, to be used as a witness for the state prior to his discharge. — *Id.*, 291.

### 7. *Conduct of Trial—Reception of Evidence.*

On a trial for murder, it is error to admit evidence that the defendant had stated, at the close of the preliminary examination, that his son had confessed to him the commission of the murder, as the accused was not on trial charged with knowingly concealing a murder committed by another. — *Rose v. State*, 310.

### 8. *Instructions—Invading Province of Jury.*

Section 221, subd. 6, Code 1881, requires the court, in charging the jury, to state to them all matters of law necessary for their information in finding a verdict, with only such allusion to the evidence as may be necessary; but a court oversteps the bounds of a legal charge, though telling the jury the facts are for their decision alone, where, under the guise of an illustration of the meaning of circumstantial evidence, it devotes a long, oral charge to an argument of the very facts of the case, taking up the material constituents of the territory's case, dovetailing the facts together, and deducing and announcing a conclusion to the jury. — *Freidrich v. Territory*, 358.

### 9. *Murder—Sufficiency of Indictment.*

An indictment charging that defendant "purposely and of his deliberate and premeditated malice, killed one John Scherbring, then and there being, by then and there purposely, and of his deliberate and premeditated malice, shooting and thereby mortally wounding the said John Scherbring with a revolver pistol," etc., is sufficient to charge the crime of murder in the first degree. — *Id.*, 358.

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**CRIMINAL LAW (Continued).**
**10. *Prejudicial Instructions—Exceptions.***

Although there is no exception to the whole or a part of the charge on the ground that it is an argument upon the facts, yet, in a capital case, if there is prejudicial error, which is patent upon the face of the record, denying the accused the fair and impartial trial which is his right, the supreme court will not allow these technical objections to deprive defendant of a new trial. — *Id.*, 358.

**11. *Excessive Sentence—Proceedings Below on Reversal.***

Where, upon such information, defendant has been sentenced for a term beyond the power of the court to impose for the crime charged, he will not be discharged on a reversal of the judgment, but the case will be remanded with instructions to the court below to sentence the defendant as upon conviction for simple assault. — *Watson v. State*, 504.

**12. *Appeal—Custody of Prisoner Pending—Confinement in Jail or Penitentiary.***

Under Laws 1891, p. 350, §§ 40, 41, when a defendant convicted in a criminal action gives notice of appeal, he is entitled to remain in the county jail pending appeal, if he cannot procure bail, in a bailable offense, and ought not to be transported to the penitentiary. — *Ex parte Jones*, 557.

**13. *Same.***

The sheriff of the county where the prisoner was tried is his rightful custodian, and the warden of the penitentiary should, upon demand, deliver the prisoner to the sheriff. — *Id.*, 551.

See HOMICIDE; JURY, 1, 2; RAPE.

**DAMAGES.****1. *Punitive Damages—Personal Injuries.***

The doctrine of punitive damages is unsound in principle, and such damages cannot be recovered in this state, although the defendant may have been guilty of gross negligence. — *Spokane Truck and Dray Co. v. Hoefer*, 45.

**2. *Measure for Breach of Contract—Furnishing Supplies for Logging.***

In an action for breach of contract to furnish plaintiff supplies for carrying on certain logging operations, if defendant knew, when it entered into the contract, that plaintiff was unable to obtain the necessary supplies elsewhere, and that when it ceased furnishing same that plaintiff would be compelled to abandon the enterprise or be seriously embarrassed in its further execution, the measure of damages is the difference between the value of the logs which he could have put in the market with the full force he could have operated had the supplies been furnished as contracted, and the value of the logs he did put in with the diminished force, less the cost of getting out and handling such excess. — *Skagit Railway and Lumber Co. v. Cole*, 57.

**3. *Measure for Breach of Contract—Expenditures.***

Under a contract whereby plaintiff was to cut timber on defendant's land at a certain rate of stumpage, and defendant was to furnish him with supplies during the continuance of the contract, the plaintiff in an action for breach thereof, can recover expenses incurred by him for repeated trips from his camp to defendant's store, made with a reasonable expectation of getting the supplies needed, based upon information furnished by defendant. — *Id.*, 57.

**4. *Personal Injuries—Expense of Medical Treatment—Pleading.***

Where the complaint contains an allegation that plaintiff has been compelled to pay a certain sum for medical treatment and nursing, evidence thereof is admissible, without being pleaded as a distinct cause of action. — *Northern Pacific Railroad Co. v. Hess*, 383.

**DAMAGES (Continued).****5. Principal and Agent—Violation of Contract—Nominal Damages.**

In an action for breach of a contract whereby plaintiffs were appointed general agents of the defendant building association with sole authority to solicit members and collect admission fees in certain territory, plaintiffs will be entitled merely to nominal damages, where the only material showing at the trial was that sales had been made by other parties in plaintiffs' territory without their knowledge or consent, and there was no proof of the number of shares sold nor of the actual damage resulting therefrom to plaintiffs. — *American Bldg., etc., Assn. v. Hart*, 594.

**6. Measure of Damages—Conveyance of Lands Fraudulently Acquired.**

In such an action, where defendant has, in good faith, conveyed away a portion of the land fraudulently acquired, without any purpose to place it beyond the reach of plaintiff, the proper measure of damages for the land thus disposed of is its value at the time of its conveyance. — *Muzzy v. Tompkinson*, 616.

**7. Measure of Damages—Breach of Contract—Quantum Meruit.**

Where a party performs services under a contract, specifying the price to be paid for doing the whole work agreed on to be done, but is prevented by the act of the other contracting party from doing the whole work, the measure of damages, in an action upon *quantum meruit*, is such a proportion of the contract price as the work done bears to the whole work embraced by the terms of the agreement. — *Noyes v. Pugin*, 653.

See INTOXICATING LIQUORS, 2, 3; REPLEVIN, 1; SALE, 2, 3, 5; TRIAL, 3.

**DEED.** See BOUNDARIES, 1, 2.

**DELEGATION OF POWER.** See CONSTITUTIONAL LAW, 2; MUNICIPAL CORPORATIONS, 1.

**DEPOSITION.** See WITNESS, 1.

**DIVORCE.****1. Division of Property.**

In granting a divorce the court has power, under the statute of this state (Code 1881, § 2007), to make such division of the joint and separate property of husband or wife as shall, in its discretion, appear just and equitable. — *Webster v. Webster*, 417.

**2. Same.**

Under § 2007, Code 1881, the court decreeing a divorce has power to make division of all the property of the parties, whether it is community or separate property, and the court will consider through whom the property was acquired merely as a circumstance to aid it in making an equitable division. — *Fields v. Fields*, 441.

**3. Custody of Children—Where Neither Party Blameless.**

A decree awarding the custody of children to the wife, although her conduct may not be entirely blameless, will be upheld where it is shown that the husband is in the habit of getting under the influence of liquor, that he has treated his wife harshly and cruelly, sometimes striking her, and has made charges of adultery against her which he has failed to sustain. — *Id.*, 441.

See FRAUDULENT CONVEYANCES, 3; PUBLIC LANDS, 5.

**EJECTMENT.***Title to Support Pre-emption Entry Receipt.*

Under the laws of this state the holder of a final receipt for entry upon public lands, which is in force and uncanceled, may maintain an action of ejectment to protect his possession thereunder.—*Pierce v. Frace*, 81.

See **RIPARIAN RIGHTS**, 6.

**ELECTIONS AND VOTERS.** See **CONSTITUTIONAL LAW**, 4, 5; **COUNTIES**, 2, 3, 4, 5; **MUNICIPAL CORPORATIONS**, 11, 12, 13.

**EMINENT DOMAIN.**1. *Wharves on Navigable Waters.*

The building by the state or its grantees of wharves upon shores of navigable waters is neither a taking nor a damaging of private property for public use.—*Eisenbach v. Hatfield*, 236.

2. *Remedies of Land-Owner—Charter Provisions Repealed by General Law.*

The act of February 1, 1888 (Laws 1887-8, p. 58), providing a general and complete method of ascertaining and obtaining damages in consequence of the appropriation of land by corporations for railway purposes, requiring actions to be brought in the district court, and declaring the remedy exclusive of all others, repeals by implication the provisions of the charter of Spokane Falls (Laws 1885-6, p. 304, § 11) allowing actions for damages to abutting property from building railroads in streets to be recovered before a justice of the peace.—*Northern Pacific R. R. Co. v. Haas*, 376.

3. *Entry Before Condemnation—Action for Trespass.*

Where an entry is made by a railroad upon lands without notice to the owner thereof of an intention to take under the statute for that purpose, and without any setting apart of the land to be so taken, the owner may maintain trespass for injuries to his trees and other property, and is not confined to the proceeding provided by the act of February 1, 1888, regulating the mode of appropriating land, and ascertaining and securing compensation therefor.—*Bellingham Bay Ry., etc., Co. Loose*, 500.

See **MUNICIPAL CORPORATIONS**, 9; **RIPARIAN RIGHTS**, 8.

**EQUITY.**1. *Decree—Findings of Law and Fact.*

Although findings of fact and law are proper in a suit in equity, they are not essential to the validity of a judgment rendered therein.—*Kilroy v. Mitchell*, 407.

2. *Cancellation of Deed—Pleading—Want of Consideration.*

In an action by a daughter to set aside a deed executed to her father on the ground of want of consideration and false representations as to the nature of the conveyance, the complaint showed the relation of the parties and the defective mental and business character of the plaintiff; that the father, while the relation of trust and confidence existed between him and his daughter, and with knowledge of plaintiff's inexperience, procured her to sign a certain writing without paying any consideration therefor; that this writing was a deed to defendant, and that he represented it to be a mortgage. *Held*, That the gravamen of the action depends as much upon the allegation of want of consideration as upon that of fraudulent representation, and that proof of want of consideration will entitle plaintiff to relief although she may fail to sustain the allegations of fraudulent representation.—*Muzzy v. Tompkinson*, 616.



## EQUITY (Continued).

3. *Same—Sufficiency of Evidence to Sustain Decree.*

In such an action, judgment for plaintiff is justified, when the evidence shows that a mortgage and certain deeds were executed by plaintiff by the direction of the defendant; that she did not know the purport and effect of the same; that the same were executed without any consideration moving to her; that no attempt was made by any one to explain to her the purport and effect of said instruments; that she was of defective mental capacity and inexperienced in business; and that she was living with her father, wholly under his influence, and accustomed to rely implicitly on his advice and obey his instructions. — *Id.*, 616.

See APPEAL AND ERROR, 13, 15; INJUNCTION, 1, 2; MECHANICS' LIENS, 2.

## ESTOPPEL.

1. *Estoppel in Pais—Of Tax-payers—Validity of Tax.*

Although the contract of county commissioners for the building of a county road may be illegal, and the issue of warrants in payment therefor unauthorized in excess of a certain amount, the payment of such warrants will not be enjoined at the suit of tax-payers who themselves signed a petition for said improvement, had knowledge of the contract at the time it was made, and stood by and permitted the work to be carried on without objection until the road was completed. — *Travis v. Ward*, 30.

2. *Estoppel in Pais—Failure to Deny Liability.*

The failure on the part of defendants to deny liability, and their taking of a joint receipt for the sum paid, will not operate as an estoppel on the ground that they thereby led plaintiff, who was the assignee of the original contractor, to believe that they had jointly contracted, or were jointly liable, when plaintiff before bringing suit sought to hold but one of the defendants liable. — *Pacific Cable, etc., Co. v. McNatt*, 216.

3. *Estoppel by Record—Recorded Plat.*

Where one purchases lots according to a recorded map or plat thereof, which are partly upland and partly tide land, with an alley and other lots platted over tide water in front of them, the purchaser is estopped from claiming any rights beyond the platted boundaries of his lots, as against the rights of the public in said alley, and of those in possession of the lots beyond such alley. — *Kenyon v. Knipe*, 394.

## EVIDENCE.

1. *Sufficiency to Sustain Verdict.*

In an action against a sheriff for conversion of goods, where plaintiff testified that she gave \$785 for certain goods, depending largely on the vendor's word as to their value, and another witness testified that the goods were worth about \$800, while the defendant testified that he obtained \$378.40, the best price possible for the goods at sheriff's sale, a verdict for \$975, including interest from time of conversion, will not be set aside as excessive. — *McGraw v. Franklin*, 17.

2. *Written Instrument—Parol Evidence.*

Testimony by defendant as to the length of time a bond had to run is admissible without proof of its loss, where such evidence is not offered to prove the contents of the bond, but is given as part of a conversation with the plaintiff, and for the purpose of showing defendant's version of the contract between them for a sale of the bonded land to other parties. — *Seattle Land Co. v. Day*, 451.

## EVIDENCE (Continued).

3. *Foreign Judgments—Admissible Without Judge's Certificate.*

Under Code 1881, § 430, the records and proceedings of courts of another state are admissible in evidence in all cases in this state without the certificate of the judge thereof that the attestation of the clerk having charge of the records of such court is in due form. — *Ritchie v. Carpenter*, 512.

4. *Same—Attestation—Presumption as to Custodian.*

Under § 905, Rev. St. U. S., it will be presumed, without being certified or otherwise shown, that the clerk attesting such records offered in evidence is the proper custodian thereof. — *Id.*, 512.

5. *Same—Seal.*

In attesting such records it is not necessary that the seal of the court be attached to the records, but only to the certificate of the clerk. — *Id.*, 512.

6. *Same—Signing Judgment.*

The signature of the judge to the journal entry of the judgment offered in evidence is not necessary to make it valid. — *Id.*, 512.

7. *Pleading and Proof—Variance.*

Where a complaint describes a judgment as rendered for costs in the sum of \$19.30, and the judgment offered in evidence was rendered for \$18.30, the variance is immaterial. — *Id.*, 512.

8. *Relevancy.*

Where a letter is part of the correspondence between parties concerning the subject of fire brick, specifying the price thereof and containing statements as to the quality of the brick which plaintiff proposed to sell defendant, the mere fact that other brick had been shipped to defendant just previous to the order for those in controversy does not render the letter irrelevant or immaterial, although it does not specifically refer to the brick in controversy. — *Tacoma Coal Co. v. Bradley*, 600.

9. *Competency—Action Upon Quantum Meruit—Customary Price.*

In an action upon a *quantum meruit* for services rendered by an architect, testimony showing the customary price charged by architects for similar services is competent, where there is a conflict of evidence as to whether or not there was a rate of compensation agreed on. — *Noyes v. Pugin*, 653.

See APPEAL AND ERROR, 21, 23, 25; ATTACHMENT, 2, 5, 6; BOUNDARIES, 1, 2; CONTRACTS; CRIMINAL LAW, 6, 7; EQUITY, 3; HOMICIDE, 1, 2; JUDGMENT, 7; NEGLIGENCE, 3; PAYMENT; PLEADING, 2, 6; SPECIFIC PERFORMANCE, 4; TRIAL, 6; WITNESS, 2, 3.

EXCEPTIONS. See APPEAL AND ERROR, 2, 13; CRIMINAL LAW, 10; PLEADING, 3.

EXHIBITS. See APPEAL AND ERROR, 15; PLEADING, 5.

EX POST FACTO LAW. See CONSTITUTIONAL LAW, 3.

## FACTORS AND BROKERS.

1. *Real Estate Agents—Revocation of Authority—Commissions.*

Where the owner of real estate contracts with an agent for its sale, if there is no limit of time fixed between the parties, the agent's authority may be revoked at any time; and if, at the time of the revocation, the agent had a negotiation pending for the sale, which is afterward continued and consummated by the owner, the agent is entitled to his commission. — *Knox v. Parker*, 34.



**FACTORS AND BROKERS (Continued).**

**2. Real Estate Agents — Commissions — Defective Title.**

Where land bonded for \$16,000 is placed in a real estate broker's hands for sale under contract that the holder of the bond should first make \$500 out of any sale the broker might negotiate, the broker to have all profit in excess thereof, and a sale was negotiated for \$18,000, which the purchaser subsequently refused to complete on the ground of defect of title, the broker is not entitled to a commission. — *Seattle Land Co. v. Day*, 451.

**FINDINGS.** See APPEAL AND ERROR, 6, 10, 23; BONDS; EQUITY, 1; LANDLORD AND TENANT, 2.

**FIXTURES.** See MECHANICS' LIENS, 8.

**FRAUD.** See ATTACHMENT, 5, 6; DAMAGES, 6; INSOLVENCY, 2.

**FRAUDS, STATUTE OF.**

***Promise to Answer for Debt of Another — Consideration.***

A promise to pay the note of another at maturity need not be in writing where the promise is made directly to the maker of the note and in consideration of its execution. — *McGraw v. Franklin*, 17.

**FRAUDULENT CONVEYANCES.**

**1. Insolvency — Preferring Creditors not Fraud.**

Under the laws of this state, a debtor in failing circumstances may mortgage his entire property to secure *bona fide* debts to a portion of his creditors, and leave the debts due other creditors unsatisfied. — *Turner v. Iowa National Bank*, 192.

**2. Facts Sufficient to Set Aside.**

Where a debtor in failing circumstances transfers all her real and personal estate for an inadequate consideration to one creditor who is cognizant of the fact that other creditors are pressing for payment of their claims, and the creditor to whom the property has been transferred allows the debtor and her husband to remain in possession and control of the property, making payment to creditors out of the rents and profits thereof, the conveyances will be set aside as fraudulent and void as against creditors. — *Banner v. May*, 221.

**3. Conveyance to Avoid Payment of Alimony.**

Where a man, just prior to commencing a suit for divorce, conveys to his brother all his real and personal property, including his home, without receiving any cash payment therefor, or any written security, without any definite time of payment agreed upon, and dependent upon the grantee's verbal promise to give him some money from time to time, the conveyance will be held fraudulent as against the wife. — *Fields v. Fields*, 441.

**HABEAS CORPUS.**

**1. Hearing and Determination — Legality of Judgment not Questioned.**

The statute providing that no court shall inquire into the legality of any judgment or process whereby the party is in custody, when such custody is upon any process issued on any final judgment of a court of competent jurisdiction, precludes the supreme court, in *habeas corpus* proceedings, from questioning the judgment of a court of general jurisdiction fair upon its face. — *In re Lybarger*, 131.

**2. Constitutional Law.**

Such statute does not transgress the constitutional provision securing the right to the writ of *habeas corpus*. — *Id.*, 131.

**HARBORS AND HARBOR LINES.** See **PROHIBITION**, WRIT OF, 2; **RIPARIAN RIGHTS**, 3, 8.

## **HOMICIDE.**

### 1. *Murder—Sufficiency of Evidence—Testimony of Accomplice.*

The evidence of an accomplice, uncorroborated in material matters, is insufficient to authorize a verdict of guilty, except in those cases where, from all the circumstances, the honest judgment is satisfied of guilty beyond a reasonable doubt. Under the facts in this case, it is held that the testimony of the accomplice in the murder is untrustworthy, and the facts claimed to be in corroboration of his story are wholly immaterial. — *Edwards v. State*, 291.

### 2. *Same.*

It is held in this case that the testimony of the accomplice charging the defendant with murder is untrustworthy and uncorroborated in any material fact, and therefore insufficient to support a conviction. — *Rose v. State*, 310.

### 3. *Assault with Intent to Kill—Information.*

An information which alleges in the formal part that the defendant is "guilty of the crime of assault with intent to commit murder," but which fails, in setting out the acts constituting an assault, to affirmatively charge that by such acts defendant intended to murder the party assaulted, merely charges the crime of assault. — *Watson v. State*, 504.

See **CRIMINAL LAW**, 7, 9, 10.

## **HUSBAND AND WIFE.**

### 1. *Community Property—Negotiable Instrument—Indorsement.*

The maker of a promissory note payable to the order of a married woman guarantees her capacity to indorse and transfer the same; and the fact that the note is community property will not affect the title of a *bona fide* indorsee for value before maturity, where he has no notice that the note is community property. — *Castor v. Peterson*, 204.

### 2. *Community Property—Liability for Separate Debts.*

Where a party dies possessed of an interest in community property which is not required to pay the community debts, and is not otherwise exempt, such interest is liable for his separate debts when his separate property is exhausted. — *Columbia National Bank v. Embree*, 331.

See **DIVORCE**, 1, 2, 3.

**INDICTMENT AND INFORMATION.** See **CONSTITUTIONAL LAW**, 3; **CRIMINAL LAW**, 4, 9; **HOMICIDE**, 3; **QUO WARRANTO**; **RAPE**, 1.

## **INJUNCTION.**

### 1. *Improvements on Tide Lands Fronting Riparian Proprietor.*

A riparian proprietor cannot maintain injunction against the owners of valuable improvements in actual use for commerce, trade and business, made on tide lands in front of his premises prior to March 26, 1890, as, by the Laws 1889-90, p. 435, § 11, the owners of such improvements are given the exclusive right of purchase of the land so improved for a period of sixty days after their final appraisal by the state. — *Eisenbach v. Hatfield*, 236.

## INJUNCTION (Continued).

2. *Equity will not Restrain Abatement of Nuisance.*

Where plaintiff, in violation of law, places and maintains his fence upon a public highway, a court of equity will not grant him relief by injunction against parties destroying or threatening to destroy such fence. — *Johnson v. Maxwell*, 482.

See ESTOPPEL, 1; PROHIBITION, WRIT OF, 3

## INSOLVENCY.

1. *Effect of Assignment—Other Proceedings Against Debtor.*

Under § 2022 of the Code of 1881, after the court, in insolvency cases, has made an order staying all proceedings against the debtor; the court has no authority to set aside the stay or allow attachment proceedings commenced against his property. — *Traders' Bank v. Van Wagenen*, 172.

2. *Title of Assignee—Not Affected by Fraud of Debtor.*

Under the laws of this state, after the institution of insolvency proceedings, all questions relating to the fraud of the debtor should be tried therein, and if the debtor is convicted of fraud he cannot obtain his discharge, nor the return of his estate, as that has become vested in the assignee for the benefit of his creditors. — *Id.*, 172.

3. *Effect of Discharge—Foreclosure of Mortgage—Judgment Over.*

Where a decree of foreclosure was rendered against a debtor a few days subsequent to his discharge in insolvency, but before the order of discharge was entered, and the debtor failed to apply to the court to limit plaintiff's recovery in the foreclosure proceedings to the proceeds of sale thereunder, the discharge will not prevent a recovery of any deficiency remaining after sale of the mortgaged premises. — *Leisure v. Kneeland*, 537.

See FRAUDULENT CONVEYANCES, 1, 2.

INSTRUCTIONS. See CRIMINAL LAW, 8, 10; INTOXICATING LIQUORS, 3; RAPE, 1; SALE, 5; TRIAL, 1, 2, 3, 5, 6.

## INSURANCE.

*Action on Policy—Limitation as to Time.*

Where a policy of fire insurance provides that no action thereon "shall be sustained unless commenced within six months after the fire shall have occurred," the period of limitation begins to run from the date of the fire, although another clause of the policy may provide that "no loss shall become due and payable" until proof of loss is made, and examined into by the insurance company. — *State Insurance Co. v. Meesman*, 459.

INTEREST. See JUDGMENT, 8.

INTERVENTION. See TRIAL, 4.

## INTOXICATING LIQUORS.

1. *Disposition of License Fees—Provisions of City Charter Repealed by General Law.*

The provisions of the city charter of Spokane Falls permitting the city to license and tax bar-rooms, drinking shops and saloons, and keep all moneys that shall come to the city by taxation or otherwise, are repealed by the later general law approved February 2, 1888 (Laws 1887-88, p. 124), providing that ten per cent. of liquor license fees received by each incorporated city, town or village in Washington Territory shall be paid into the territorial treasury. — *State v. Spokane Falls*, 40.

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**INTOXICATING LIQUORS (Continued).**
**2. Civil Damage Laws—Misjoinder of Parties.**

Where a widow and minor children sue jointly for the death of the husband and father, under § 2059, Code 1881, giving a right of action for injuries resulting from the intoxication of any person, there is a misjoinder of parties plaintiff, as the words "severally or jointly" in said section refer to defendants and not to plaintiffs.—*Delfel v. Hanson*, 194.

**3. Civil Damage Laws—Injury to Means of Support—Erroneous Instructions.**

Where a complaint, in an action for damages for injuries caused by the use of intoxicating liquors, bases the claim for damages on the injury to plaintiffs' means of support, it is error for the court to instruct the jury that plaintiffs would be entitled to damages for injuries to their property, person or means of support.—*Id.*, 194.

**JUDGE.** See **APPEAL AND ERROR**, 17; **STATEMENT OF FACTS**.

**JUDGMENT.****1. Before Entry of Default, Erroneous.**

It is error to render judgment against a party who makes default before the default has been entered.—*Dexter Horton & Co. v. Sparkman*, 175.

**2. Joint Judgment—Joint Liability not Shown.**

In an action against two corporations for materials furnished them on request of certain of their officers, a joint judgment cannot be sustained where there is no evidence that the officers had authority to bind defendants jointly, and the only evidence of a joint contract was the failure, at an interview between the parties subsequent to the contract, to deny such a liability, and the taking by defendants of a joint receipt for a payment made on account of said contract.—*Pacific Cable, etc., Co. v. McNatt*, 216.

**3. Voidable Judgment—Joint Defendants—Prevailing Parties.**

Although the pleadings may not entitle defendants in an action to affirmative relief, a decree determining the rights of defendants between each other is voidable, and not void, where the court had jurisdiction of the persons and subject-matter; and those in whose favor it establishes rights are prevailing parties.—*Jones v. Sander*, 329.

**4. Action on Foreign Judgment—Action Appealed from Justice of the Peace to District Court—Errors in Justice Court.**

In an action upon a judgment of the district court of the State of Kansas, originally instituted before a justice of the peace, the objections raised here, that the action was instituted and carried on in Kansas, without any complaint having been filed, that there was no proof that the justice had any authority to certify the case to the district court, and that he did not in fact so certify it, are wholly immaterial.—*Ritchie v. Carpenter*, 512.

**5. Same—Jurisdiction Presumed.**

In an action upon a judgment of a court of record of another state, it will be presumed, in the absence of evidence to the contrary, that it is a court of general jurisdiction; and the recitals in the record of such court of the jurisdiction acquired over defendant's person in that proceeding are *prima facie* evidence thereof.—*Id.*, 512.

**6. Same—Pleas to Jurisdiction.**

Want of jurisdiction may be shown by the defendant even to the extent of contradicting express recitals in the record; but pleas to the jurisdiction must be direct and certain, and set up the facts which go to show a want of it.—*Id.*, 512.

## JUDGMENT (Continued).

7. *Same.*

The name of the defendant in the record offered being identical with that of the defendant in this action is *prima facie* proof of identity of person; and it is incumbent upon the defendant, in order to raise the question of identity, to allege and prove every fact necessary to show that the court had no jurisdiction of his person. — *Id.*, 512.

8. *Same—Verdict for Judgment, Costs and Interest.*

In an action upon a judgment of a court of the State of Kansas, a verdict for the aggregate amount of the judgment there rendered, including the costs of the proceeding and interest thereon, is not erroneous. — *Id.*, 512.

9. *Judgment by Default—Service of Complaint.*

Judgment upon failure to answer can be entered, as of course, without proof of the plaintiff's demand, under Code 1881, § 289, subdivision 1, only where the summons and complaint have been served upon the defendant, and proof of such service filed with the clerk; and § 289 is in no way modified or repealed by the act of February 2, 1888, which makes it no longer necessary that a copy of the complaint be served in order to acquire jurisdiction over the person of a defendant. — *Spokane Falls v. Curry*, 541.

10. *Same—Motion to Set Aside—Discretion of Court.*

A motion to set aside a judgment by default is within the discretion of the trial court to grant or deny. — *Id.*, 541.

See APPEAL AND ERROR, 14; CRIMINAL LAW, 1; EQUITY, 1; EVIDENCE, 3, 4, 5, 6, 7; HABEAS CORPUS, 1; INSOLVENCY, 3; JUSTICE OF THE PEACE, 2; LOGS AND LOGGING, 6; PLEADING, 4; SPECIFIC PERFORMANCE, 3.

JURISDICTION. See APPEAL AND ERROR, 18; HABEAS CORPUS, 1; JUDGMENT, 5, 6, 7; JUSTICE OF THE PEACE, 1, 2; PROHIBITION, WRIT OF, 1, 3; SPECIFIC PERFORMANCE, 2.

## JURY.

1. *Competency of Juror—Impressions Formed from Newspaper Reports.*

One called as a juror in a trial for murder who states that he has read accounts of the affair in the current newspapers, that he has talked with others in regard to it and heard them express opinions, that he has formed but not expressed an opinion of his own, and that his former impressions would have no influence upon him as a juror, is competent. — *Rose v. State*, 310.

2. *Same—Strong Evidence Required to Remove Opinion Formed.*

One called as a juror in a criminal case who states that he has formed an opinion as to the guilt or innocence of the accused which it would take strong evidence to remove, but that he could lay aside his previous impressions and be governed by the evidence given at the trial and the law as charged by the court, is incompetent. — *Id.*, 310.

3. *Misconduct of Jury—Separation—Affidavits.*

Under Code 1881, § 278, providing that misconduct of the jury shall be shown by affidavit on motion for new trial, the misconduct of the jury in separating and each going his own way without the custody of the court, must be shown by affidavit where the record is silent as to whether such separation was by consent of the parties, otherwise it will not be considered by the supreme court on appeal. — *Lybarger v. State*, 552.

See APPEAL AND ERROR, 25; ATTACHMENT, 1; CRIMINAL LAW, 2, 8; TRIAL, 3.

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**JUSTICE OF THE PEACE.**
**1. Jurisdiction—Amount in Controversy.**

Under the constitution of the State of Washington, justices of the peace have no jurisdiction in causes in which the demand or value of the property in controversy is one hundred dollars or more.—*Moore v. Perrott*, 1.

**2. Void Judgment—Effect of Appeal.**

Where the judgment of a justice of the peace rendered November 18, 1889, for an amount larger than one hundred dollars is void because of the constitutional provision (art. 4, §§ 6, 10) limiting the jurisdiction of justices to amounts less than one hundred dollars, the removal of the cause to the superior court under the form of an appeal will be treated as a compliance with art. 27, § 5, of the constitution, providing for the transfer of pending actions to the court, having jurisdiction of the subject-matter.—*Id.*, 1.

**3. Compensation as Police Magistrate.**

A justice of the peace who has been designated under the charter of a city to act as police magistrate therefor can receive only such fees as are provided by general statute, and a municipal ordinance fixing the salary of such police magistrate is void.—*Furth v. McIntosh*, 108.

See JUDGMENT, 4.

**LANDLORD AND TENANT.**
**1. Lease—Forfeiture—Waiver—Pleading.**

In an action for the forfeiture of a lease for breach of a covenant against making alterations without the consent of the lessor, it is error to strike from the answer allegations that the plaintiff had full knowledge of the making of the alterations at the time when made, that she continued to receive rent accruing thereafter, and did not object to the alterations until some time subsequently.—*Pettygrove v. Rothschild*, 6.

**2. Same—Striking Allegations of Waiver—When Error not Cured.**

Such error is not cured by the fact that some evidence in support of the allegations stricken from the answer was incidentally introduced, and that the court made a finding of facts thereon, when the record does not show that the order to strike was ever vacated, nor that the matter was fully gone into.—*Id.*, 6.

**3. Lease—Specific Performance, as Against Subsequent Vendee.**

Where a tenant enters into possession of premises under a lease which does not contain the name of one of the lessors in the granting clause, and which is signed but not acknowledged by the lessors, and the tenant makes improvements on the premises and pays rent therefor, he is entitled to specific performance of the terms of the defective lease, as against a subsequent vendee of his lessors, who takes with actual knowledge of such tenant's rights.—*Schulte v. Schering*, 127.

**LEGISLATIVE POWER.** See CONSTITUTIONAL LAW, 1, 2, 4.

**LICENSE.** See RIPARIAN RIGHTS, 4.

**LIENS.** See LOGS AND LOGGING; MECHANICS' LIENS.

**LOGS AND LOGGING.**
**1. Liens of Laborers—Manufacturing Lumber—Notice of Claim of Lien—Description of Property.**

A notice of claim of lien "for labor performed in manufacturing lumber," which describes the lumber as "being about 100,000 feet

## LOGS AND LOGGING (Continued).

which was manufactured in Kitsap county, Washington State, and which is marked thus ———, and is now lying at the saw-mill owned by said Builders' Material Co. in Kitsap Co., the same being the place where said lumber was manufactured, and situated about two miles south of Port Blakely, on Puget Sound," complies with the statute giving a lien for "manufacturing saw-logs into lumber," and requiring a description of the property "sufficient for identification with reasonable certainty." — *Dexter Horton & Co. v. Sparkman*, 165.

2. *Same* — *Insufficient Description*.

Under Code 1881, § 1947, which requires a description of the property sought to be charged with a lien sufficient for identification with reasonable certainty, a claim of lien which describes the property as "a quantity of lumber, being about 70,000 feet, now lying at the defendant's saw-mill in said county," is insufficient. — *Dexter Horton & Co. v. Wiley*, 171.

3. *Same* — *Assignee of Claim has no Lien*.

The lien given by statute is personal to the laborer; and where the laborer combines with his own claim one assigned him by another laborer, he loses all right to take benefit of the foreclosure. — *Dexter Horton & Co. v. Sparkman*, 165.

4. *Manufacturing Shingles*.

No lien is given by statute for the manufacture of shingles, and where the notice is for manufacturing lumber and shingles, without showing how much is due for labor on the lumber and how much on the shingles, the whole lien fails. — *Id.*, 165.

5. *Notice of Claim* — *Verification*.

Where a claim of lien is verified by another than the claimant, a verification to the effect that he believes it to be true is sufficient. — *Id.*, 165.

6. *Judgment in Excess of Claim of Lien*.

A judgment awarding liens on the shingles not mentioned in the claim of lien is erroneous. — *Id.*, 165.

See DAMAGES, 2, 3.

## MANDAMUS.

1. *Procedure* — *Stay Pending Appeal*.

On an appeal from a judgment directing the issuance of a writ of mandate, it is error for the superior court to deny defendant's motion for a *supersedeas* of the writ pending the appeal, and to fix the amount of his bond therefor. — *State v. Superior Court of Whatcom Co.*, 9.

2. *Alternative Writ* — *Prima Facie Case Necessary*.

In an application to the supreme court for *mandamus*, no alternative writ will be issued, unless the allegations in the petition therefor make out a *prima facie* case for the issuance of a peremptory writ. — *Parrish v. Reed*, 491.

See CONTEMPT; PROHIBITION, WRIT OF, 1.

## MECHANICS' LIENS.

1. *Property Subject to* — *Street Railways*.

A laborer can have no lien upon a street railway, under ch. 138, Code 1881, unless the person causing the railway to be constructed has some estate in the land over which it is laid. — *Front Street Cable Ry. Co. v. Johnson*, 112.



**MECHANICS' LIENS (Continued).****2. Enforcement — Legal Defense.**

A suit to foreclose a mechanic's lien cannot be transformed into an action at law by the defendant setting up a legal defense by way of counter-claim. — *Kilroy v. Mitchell*, 407.

**3. Removable Fixtures not Subject to.**

There can be no lien obtained upon personal property not attached to a building so as to become a part of it, under the provisions of chapter 138, Code 1881, "relating to liens of mechanics and others upon real property." — *Vendome Turkish Bath Co. v. Schettler*, 457.

**MISTAKE.** See SPECIFIC PERFORMANCE, 5; VENDOR AND VENDEE.

**MORTGAGES.****1. Foreclosure — Pleading — Allegation of Interest.**

In an action to foreclose a mortgage the allegation that a party, who is made co-defendant with the mortgagor, has, or claims to have, some interest in, or claim upon, the mortgaged premises, is sufficient without averring the character of the interest. — *Dexter Horton & Co. v. Long*, 435.

**2. Same — Decree — Attorney's Fee.**

Where the complaint in a foreclosure proceeding alleges that \$250 is a reasonable attorney's fee, and the answer denies that any greater sum than \$100 is a reasonable fee, the court should, in the absence of testimony on the point, find that \$100 is a reasonable attorney's fee. — *Id.*, 435.

See CORPORATIONS; INSOLVENCY, 8.

**MUNICIPAL CORPORATIONS.****1. Power to Create Police Courts.**

Cities of twenty thousand inhabitants, or more, have no power, under the constitutional authority given them to frame charters for their own government, to provide therein for the creation of municipal or police courts, as all such power is delegated by the constitution to the legislature. — *In re Cloherty*, 137.

**2. Same.**

There is no provision in the acts of March 24 and March 27, 1890 (Laws 1889-90, pp. 215, 131), for the establishment of police courts in cities of twenty thousand or more inhabitants. — *Id.*, 137.

**3. Assessments for Improvements — Validity — Remedies.**

When there is no remedy by appeal by which the validity of a street assessment may be contested, *certiorari* is the proper method of reviewing the proceedings therefor. — *Wilson v. Seattle*, 543.

**4. Same — Law in Force at Time of Levy to Govern.**

Where proceedings were begun for the improvement of a street in the city of Seattle while the charter of 1886 and the ordinance thereunder were in force providing that the assessment therefor should be according to the value of the property abutting on the improvement, and subsequent thereto, but prior to the levying of the assessment, the old charter was superseded by the charter of 1890 providing that the expense of making street improvements should be levied according to the frontage of property on the improvement, an assessment according to value is unauthorized and void. — *Id.*, 543.

**5. Same — Notice — Presumption.**

Where the ordinance under which a street improvement is authorized provides that notice of the assessment therefor shall be



## MUNICIPAL CORPORATIONS (Continued).

published in a daily newspaper for ten successive days, notice according to the terms of the ordinance is absolutely necessary; and there can be no presumption, in such a case, that due notice was given. — *Id.*, 543.

6. *Same—Payment of Tax Before Action to Test—Void Powers.*

Article 15, § 8 of the charter adopted by the city of Seattle in 1890 providing that "no action shall be brought or maintained to test or question the validity of any assessment unless the plaintiff shall first pay into court the amount of the assessed tax," is not within the powers granted to cities of the first class by the constitutional delegation of authority to them to frame their own charters. — *Id.*, 543.

7. *Powers of Mayor Pro Tem.—Nomination of Councilmen.*

Under the act of March 9, 1891, providing that the number of councilmen in cities of the third class shall be increased from six to seven, and authorizing the mayor or mayor *pro tem.*, on or before June 15, 1891, with the consent and approval of the council to appoint the additional member, a mayor *pro tem.*, duly elected and lawfully acting, has authority to make such appointment, although such appointment may be long prior to the time limited by law, and the mayor may be within the corporate limits of the city at the time. — *Mills v. State ex rel. Smith*, 566.

8. *Municipal Indebtedness—Payable Out of Special Fund.*

Where street improvement warrants, under powers conferred by a city charter, are payable from funds derived by creating local assessment districts within which a special levy could be laid upon the property to pay for the entire expense of street improvements, and the agreement with the contractors for work upon such improvements was that they should be paid "out of a special fund," the indebtedness created is not within the meaning of the constitutional limitation on municipal debt. — *Baker v. Seattle*, 576.

9. *Same—Condemnation Awards.*

Where, under a charter power to widen streets and to condemn such real estate as may be necessary therefor, a city has taken possession of condemned lands, without collecting benefits assessed therefor, or making payment of damages awarded thereon, the neglect of the city does not make such condemnation awards a part of the general municipal indebtedness. — *Id.*, 576.

10. *Limit of Indebtedness—Curative Act.*

Section 5 of the act of February 26, 1890, validating the existing indebtedness of any city or town, contracted for strictly municipal purposes, where the same exceeds the amount authorized by the charter of such city or town, and providing further that if the excess reach beyond one and one-half per cent. of the taxable property, three-fifths of the voters of the town must assent thereto, is not a void exercise of legislative power, as it falls within the principle that where a municipal corporation has done an act beyond its statutory powers, but within the powers which it was competent for the legislature to have conferred upon it, the act may be validated by a curative statute. — *Id.*, 576.

11. *Funding Indebtedness—Bonds—Elections to Issue.*

An election to ratify municipal indebtedness in excess of the one and one-half per cent. limit, and an election to authorize the issuance of bonds to fund the debt thus ratified, together with other debt, under separate ordinances providing for the submission of both propositions to vote on the same day, can lawfully be held at the same time and places, and but one notice of election embracing the two ordinances is required. — *Id.*, 576.

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MUNICIPAL CORPORATIONS (Continued).
12. *Bond Elections—Propositions Submitted.*

The city of Seattle having contracted for a sale of its bonds at an agreed price in advance of the authorization of their issue by popular vote, and of the validation of the indebtedness to be funded by the bonds, it was proper, under the charter of said city, to submit the proposition of sale to vote at such election. — *Id.*, 576.

13. *Same.*

A proposition to issue \$460,000 worth of bonds, or such lesser sum as may be sufficient, is not objectionable on the ground of indefiniteness, when the only authority to be given the city officers is to issue bonds to an amount sufficient to take up \$370,979.44 worth of warrants with legal interest thereon. — *Id.*, 576.

14. *Bonds—Kind.*

It is not necessary that the proposed bonds be of the kind prescribed by the act of March 26, 1890 (Laws 1889-90, p. 520), as the provisions of that act apply specially to bonds issued to raise money for water, sewer or light plants. — *Id.*, 576.

15. *Funding Indebtedness—Constitutionality of Law.*

The act of February 26, 1890 (Laws 1889-90, p. 225), empowering cities and towns organized prior to the adoption of the state constitution to extend their credit and fund their indebtedness, and validating certain indebtedness already created, is not unconstitutional by reason of embracing more than one subject. — *Id.*, 576.

16. *Same—Legislation of Session—Uniformity.*

The application of the act of February 26, 1890, to cities and towns existing at the time of the adoption of the constitution is not in violation of article 11, § 10 of that instrument, requiring the incorporation, organization and classification of cities in proportion to population, as at the same session of the legislature in compliance with this requirement, the same authority was conferred upon municipal corporations to be thereafter organized; and the legislation of the session on this subject, though not all contained in one act, was uniform and universal in its operation. — *Id.*, 576.

17. *Limit of Indebtedness—Local Improvement Bonds—Municipal Liability.*

Article 8, § 9 of the charter of the city of Seattle (1890), providing that "the city shall be liable for the payment of both principal and interest" of bonds issued for the payment of local improvements, the cost of which is to be assessed against the property benefited, makes the city primarily liable for such indebtedness; and where the city's existing indebtedness is in excess of the one and one-half per cent. limit prescribed by the constitution, the assent of three-fifths of its voters is necessary to authorize the issuance of such bonds. — *Austin v. Seattle*, 667.

18. *General Indebtedness—Water, Sewerage and Lights.*

Indebtedness for water, sewerage and light purposes does not constitute a part of the general indebtedness of the city, but is authorized, under article 8, § 6 of the constitution, in excess of the five per cent. of municipal indebtedness permitted for general purposes. — *Id.*, 667.

See CONSTITUTIONAL LAW, 1, 4, 5, 6; SCHOOLS AND SCHOOL DISTRICTS, 1, 2.

MURDER. See HOMICIDE.

NAVIGABLE WATERS. See CONFLICT OF LAWS; EMINENT DOMAIN, 1; PUBLIC LANDS, 4; RIPARIAN RIGHTS, 3, 7.

**NEGLIGENCE.****1. What Constitutes—Hoisting Safe.**

A person hoisting a heavy safe in a public thoroughfare where people are constantly passing is bound to use such care as the nature of the employment and the situation and circumstances of the same require of a prudent person experienced and skilled in such or similar work. — *Spokane Truck and Dray Co. v. Hoefer*, 45.

**2. Contributory Negligence—Matter for Defense.**

In an action by a passenger for injuries received from the falling of an upper berth in a "free emigrant car" while she was away from her seat warming herself at the stove, it is not necessary for her to plead and prove the necessity for leaving her seat, as contributory negligence is a matter for the defense to establish. — *Northern Pacific R. R. Co. v. Hess*, 383.

**3. Evidence—Sufficiency of.**

Where plaintiff testified she thought it was a brakeman who raised the berth which afterward fell and crushed her fingers, and letters written by her to the company soon after the accident were put in evidence, in one of which she said she was injured through the negligence of an employé of the company, and in another she stated that it was a newsboy who raised the berth, there was sufficient evidence to sustain a verdict for plaintiff, as the jury might have believed from her testimony that it was a brakeman who negligently raised the berth. — *Id.*, 383.

**4. Injuries to Child—Trespassers on Cars—Contributory Negligence.**

Where a boy, nine and one-half years of age, is injured while stealing a ride upon the foot-board of a switch engine, the facts that he is of ordinary intelligence, familiar with the workings of a switch engine, and aware of the danger of his act, that he has frequently been forbidden by his parents from going upon the cars, and has been driven away from them by the employés of the railroad, are sufficient to establish contributory negligence on his part. — *O. R. & N. Co. v. Egley*, 409.

**5. Same.**

It is not negligence on the part of a railroad company for its employés to fail to ascertain that a boy of tender years is stealing a ride, unknown to them and out of their sight, on the back foot-board of a switch engine, when they have made a practice of preventing such acts by driving boys away when they saw them about the cars. — *Id.*, 409.

See DAMAGES, 1, 4; TRIAL, 1.

**NEGOTIABLE INSTRUMENTS.** See HUSBAND AND WIFE, 1;  
VENDOR AND VENDEE.

**NEW TRIAL.****Application—Joint Parties—Motion.**

In an action against joint defendants, where judgment by default has been rendered against one and judgment recovered against the others on the trial of the action, it is not error to grant a new trial as to the defendants who answered and deny it as to the defaulting defendant, although the motion for a new trial may have been made in the name of all the defendants. — *Ex parte Lowman v. Hanford Co.*, 427.

See APPEAL AND ERROR, 16; CRIMINAL LAW, 3; JURY, 8.

**NOTICE.** See APPEAL AND ERROR, 9, 18; EMINENT DOMAIN, 3;  
LOGS AND LOGGING, 1, 2, 4; MUNICIPAL CORPORATIONS, 5;  
SPECIFIC PERFORMANCE, 1.

**NUISANCE.***Obstructing Public Road—Abatement.*

The obstructing of a public road by building a fence therein is a nuisance which may be abated by any person injuriously affected thereby, provided it be done without committing a breach of the peace, or doing unnecessary injury. — *Johnson v. Maxwell*, 482.

See INJUNCTION, 1.

**OFFICE AND OFFICER.** See JUSTICE OF THE PEACE, 3; MUNICIPAL CORPORATIONS, 7; QUO WARRANTO; SCHOOL AND SCHOOL DISTRICTS.

**ORDINANCES.** See MUNICIPAL CORPORATIONS, 5, 11.

**PARTIES.** See APPEAL AND ERROR, 9; ATTACHMENT, 3; INTOXICATING LIQUORS, 2; JUDGMENT, 2, 3; NEW TRIAL.

**PAYMENT.***Evidence—Sufficiency.*

Goods recently sold to plaintiff were attached by a creditor of her vendor, and in consideration of plaintiff's giving her note and a mortgage on the goods for the debt, the vendor promised to pay the note at its maturity. The note and mortgage were assigned by the payee to the vendor's brother, who foreclosed the mortgage. In replevin against the sheriff in possession of the goods under the foreclosure proceedings, plaintiff alleged that the vendor in fact paid the note, but instead of discharging the mortgage he fraudulently procured its transfer to his brother. It was shown that the brother had no money with which to buy the note, and it was conflicting as to whether the money with which the note was purchased was furnished him by the vendor or another person. *Held*, That a judgment for plaintiff would not be disturbed. — *McGraw v. Franklin*, 17.

**PLATS.** See BOUNDARIES, 2, 3; ESTOPPEL, 3.

**PLEADING.**1. *Amendment—Time of—After Evidence in.*

The refusal of the superior court to permit defendant to amend its answer so as to set up another defense, after the plaintiff had rested his case, which amendment would have necessitated a continuance to enable plaintiff to procure witnesses to meet the new defense, is not such an abuse of discretion as to justify a reversal of the judgment. — *Skagit Railway and Lumber Co. v. Cole*, 57.

2. *Pleading and Proof—Variance—Evidence Admissible.*

Where the complaint alleges that plaintiff was prevented from carrying on his business by reason of defendant's failure to furnish supplies, and that plaintiff could not procure and pay for supplies elsewhere, proof is admissible to show that plaintiff had attempted to procure supplies from other parties and had failed to get them. — *Id.*, 57.

3. *Motion to Strike—Not Waived by Answering.*

The filing of a substituted answer by defendant does not operate as a waiver of his exception to an order striking out an affirmative defense in his original answer. — *Schulte v. Littlejohn*, 129.

## PLEADING (Continued).

4. *Affirmative Defense to Surplusage—Judgment on Pleadings.*

Where plaintiffs allege in their complaint that they had filed a lien upon certain lumber and shingles, but the copies of liens forming part of the complaint show that liens were not claimed upon the shingles, the answer of defendant specifically denying all the allegations of the complaint, and setting up as a new defense that the shingles were cut and sawed from shingle bolts made by other parties than the plaintiffs, to which plaintiffs file no reply, does not entitle defendant to judgment on the pleadings.—*Dexter Horton & Co. v. Sparkman*, 165.

5. *Bill of Particulars—Action on Public Accounts.*

Where the accounts sued on are public accounts, equally accessible to defendants as to plaintiff, it is not error for the court to refuse to order plaintiff to furnish a bill of particulars to defendants, as it is a matter resting largely in the discretion of the trial court whether a bill of particulars should or should not be ordered in a particular case.—*Ferry v. King County*, 337.

6. *No Reply to Affirmative Defense—Evidence Inadmissible.*

Under Code 1881, § 103, providing that every material allegation of new matter in the answer not controverted by the reply shall, for the purpose of the action, be taken as true, it is error for the trial court to treat affirmative matter in the answer as denied, and permit testimony to be given accordingly.—*Johnson v. Maxwell*, 482.

See ATTACHMENT, 5, 6; DAMAGES, 4; EQUITY, 2; EVIDENCE, 7; JUDGMENT, 6, 7; LANDLORD AND TENANT, 1, 2; MORTGAGES, 1, 2; NEGLIGENCE, 2; SALE, 3, 4; SPECIFIC PERFORMANCE, 5; VENUE IN CIVIL ACTIONS, 3.

PRESUMPTION. See APPEAL AND ERROR, 10, 23; BOUNDARIES, 1, 2; CONFLICT OF LAWS; EVIDENCE, 4; JUDGMENT, 5; MUNICIPAL CORPORATIONS, 5.

PRINCIPAL AND AGENT. See DAMAGES, 5; FACTORS AND BROKERS, 1, 2.

## PROHIBITION, WRIT OF.

1. *When Granted—Court Exceeding Jurisdiction.*

The supreme court will not grant a writ of prohibition to restrain the superior court from further proceedings in an application for *mandamus*, where the superior court has already exercised jurisdiction and issued the writ of mandate, and no proper application was made at the hearing before the superior court to test its jurisdiction.—*State v. Superior Court of Whatcom County*, 9.

2. *When Granted—No Other Remedy.*

As the writ of prohibition will be granted only in a clear case, when no other remedy is available, the court is not authorized to grant it for the purpose of preventing the harbor commission from defining harbor lines.—*Harbor Line Commissioners v. State*, 530.

3. *Court Exceeding Jurisdiction—Remedy by Appeal.*

The writ of prohibition will not lie to restrain courts having original jurisdiction of cases in equity from issuing injunctions in excess of their jurisdiction, when there is a complete remedy by appeal from any final judgment that may be rendered by said courts in such cases.—*State ex rel. Reed v. Jones*, 662.

## PUBLIC LANDS.

1. *Cancellation of Entry.*

Until the issuance of patent for an entry under the pre-emption laws of the United States, the commissioner of the general land office may suspend the entry, and order a re-examination as to the pre-emption claimant's residence upon and improvement of the land for which he holds the final receipt of the register and receiver, and if, on said re-examination, it is shown that the claimant has not complied with the law, the commissioner of the general land office has power to cancel the entry. — *Pierce v. Frace*, 81.

2. *Pre-emption Within Town Limits — Knowledge of Entryman.*

Plaintiff's grantor in 1874 pre-empted vacant, unoccupied public lands which had been included in the corporate limits of the city of Seattle in the year 1869 by the act of the territorial legislature incorporating said city, and did not ascertain until after entry that the land was within said corporate limits. The secretary of the interior, in 1879, canceled the entry, on the ground that, as plaintiff's grantor was at the time marshal of the city of Seattle, he must, by virtue of his office, have known that the land pre-empted was within the corporate limits. *Held*, That the secretary's decision was erroneous, as, under § 2 of the act of congress of March 3, 1877 (19 U. S. St. at Large, 392), confirming entries which, though regular in other respects, had theretofore been allowed upon lands afterward ascertained to have been embraced in the corporate limits of any town, no knowledge of the law or the fact of incorporation can be imputed to the entryman. — *Alger v. Hill*, 344.

3. *Entry of Tide Lands — Location of Valentine Scrip.*

A tract of land, shown by the public surveys to be a portion of the bottom of Elliott Bay, an arm of the sea, and which is covered and uncovered by the flow and ebb of the tide, is not "land," but "water," to which none of the public or special and private land laws of the United States, including the Valentine scrip act, have any application. — *Baer v. Moran Brothers Co.*, 608.

4. *Same.*

As the rule is a fixed one that high water mark is the limit of government grants, the fact that a portion of tide flat is uncovered at low tide, and, in consequence, not covered by navigable water, will not render such tide flat subject to entry under the act of congress (17 St. at Large, p. 649) known as the Valentine scrip act. — *Id.*, 608.

5. *Oregon Donation Act — Rights Under — Effect of Divorce.*

Where a married man became a resident of the Territory of Oregon prior to December 1, 1850, and settled on 640 acres of land in April, 1852, claiming same under the act of congress, Sept. 27, 1850 (9 U. S. St. at Large, ch. 76, p. 497), his divorce in December, 1852, reduces his rights under said act to those of a single man, and his subsequent marriage in 1853 will not put him in a position to claim more than 320 acres. — *McSorley v. Hill*, 638.

6. *Same — Extension of Time.*

Section 5 of the act of February 14, 1853 (10 U. S. St. at Large, 158), amendatory of the act of September 27, 1850, merely extends the time within which persons may acquire title under the donation act, and does not change the qualifications of the applicant thereunder. — *Id.*, 638.

7. *Same — Register's Certificate — Cancellation of Entry.*

The fact that the register of the local land office issued a certificate to a man and his wife entitling them to 640 acres under the donation law, gives them no vested right in said land where the commissioner of the general land office, under the discretion vested in him by § 7 of said act, reverses the action of the local officers. — *Id.*, 638.

**PUBLIC LANDS (Continued).**

**8. *Same—Vested Rights—Innocent Purchaser.***

Where such parties, having no vested rights in the land, and before the issue to them of a donation certificate therefor, convey said land to another, their grantee cannot be considered an innocent purchaser for value. — *Id.*, 638.

**9. *Military Entries—Porterfield Warrants.***

Under the act of congress, April 11, 1860, for the "relief of the legal representatives of Charles Porterfield, deceased," Porterfield warrants may be located upon lands which are occupied under an invalid entry. — *Id.*, 638.

**10. *Same—Assignability.***

The act of congress, March 22, 1852, § 1, providing "that all warrants for military bounty lands which have been or may hereafter be issued under any law of the United States, are hereby declared assignable," applies to the Porterfield warrants. — *Id.*, 638.

**11. *Same—Location Upon Unoffered Land.***

Where rights have been acquired under the construction of the executive department allowing Porterfield warrants to be located upon unoffered land, such rights will not be disturbed when it does not clearly appear from the act of congress that it contemplated restricting such locations to lands that were subject to private entry. — *Id.*, 638.

See EJECTMENT.

**QUO WARRANTO.**

**1. *Against Officers—Who May File Information.***

Under the statutes of this state (Code 1881, § 702, *et seq.*), relating to information in *quo warranto* proceedings, the mayor of a city has no interest in the office of city councilman sufficient to entitle him to appear as relator in such proceedings to oust an alleged usurper of that office. — *Mills v. State ex rel. Smith*, 566.

**RAILROADS.** See EMINENT DOMAIN, 2, 3; MECHANICS' LIENS, 1.

**RAPE.**

**1. *Assault With Intent to Rape—Female Under Age of Consent—Variance.***

To warrant a conviction under an information charging an assault with force, with intent to rape a female under the age of sixteen years, an assault with force must be proved; and an instruction, that the fact that she consented to the advances made constitutes no defense, is erroneous. — *Whitcher v. State*, 286.

**2. *Same.***

Though the laws of Washington make it rape to have carnal knowledge of a female under the age of consent, even with her consent, there can, in the absence of fraud, be no assault with intent to rape, when she consents, since there can be no assault without force or fraud. — *Id.*, 286.

**RATIFICATION. CORPORATIONS.**

**REHEARING.** See APPEAL AND ERROR, 22.

**REPLEVIN.**

**1. *Damages—Verdict.***

Where it appears that the verdict in an action of replevin was for damages only, it is sufficient without being in the alternative



### REPLEVIN (Continued).

for a return of the property or for the value thereof in case a delivery cannot be had, when the point was not raised in the court below. — *McGraw v. Franklin*, 17.

#### 2. *When Lies—Stone Quarried on Leased Land.*

Where the lessee of school lands quarries stone thereon, and subsequently assigns the lease and sells the stone to another party, the latter's possession under a claim of ownership made in good faith is sufficient to support an action of replevin against one who, without any right, enters upon the leased land and takes away the stone. — *Reynolds v. Dexter Horton & Co.*, 185.

#### 3. *Same—Lies for the Product of Waste by Tenant.*

Although the act of quarrying may be waste by the tenant, the possession of his grantee is good as against any mere wrong-doer. — *Id.*, 185.

See EVIDENCE, 1.

### RIPARIAN RIGHTS.

#### 1. *Ownership of Tide Lands.*

The tide lands of the State of Washington belong to the state, which has full power to dispose of them subject only to the restrictions imposed by the constitutions of the state and of the United States; and no individual can claim any easement in, or impose any servitude upon, the tide waters of the state without the consent of the legislature. — *Eisenbach v. Hatfield*, 236.

#### 2. *Wharves, Docks, etc.*

A riparian proprietor on the shore of the sea or its arms has no rights, as against the state or its grantees, to extend wharves in front of his land below high water mark. — *Id.*, 236.

#### 3. *Same—State Control.*

Under article 15 of the state constitution, requiring the legislature to provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors of the state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof; and, further, to provide general laws for the leasing of the right to build wharver, docks and other structures upon certain designated areas, or to provide by general laws for the building and maintaining of wharves, docks, and other structures upon such areas, a riparian proprietor within a mile of the corporate limits of any city has no right to extend wharves in front of his land below high water mark except by permission of the state. — *Id.*, 236.

#### 4. *Same—License Under Territorial Law.*

The act of the territorial legislature of 1854, authorizing bank owners to build wharves in front of their premises, was but a license and, until availed of, was revocable; and the constitution and subsequent laws have abrogated the act. — *Id.*, 236.

#### 5. *Accretions.*

The right of a riparian owner to future accretions to his land is not a vested right, as there can be no present vested right in that which may never have an existence. — *Id.*, 236.

#### 6. *Tide Lands—Ejectment by Riparian Proprietor.*

The littoral proprietor of land bordering on tide waters cannot maintain an action in the nature of ejectment against persons who take possession of, erect buildings on and occupy the shore between high and low water mark, opposite his premises, when such part of the shore is within one mile of the corporate limits of a city, and the littoral proprietor has acquired no right to such tide land by lease from the state. — *Pierce v. Kennedy*, 324.



## RIPARIAN RIGHTS (Continued).

7. *Tide Lands—Character of Vested Rights Secured by Constitution.*

A riparian owner of lands, by reason of such ownership, can assert no valuable rights below the line of ordinary high tide, as against the state. The provision of the constitution (art. xvii, § 1), that no person shall be debarred from asserting his claim to vested rights in the courts of this state, applies only to some special right held by a riparian owner by way of improvements made under express, or implied license from the representative of the sovereign power, and not to any vested right incident to riparian ownership. — *Harbor Line Commissioners v. State*, 530.

8. *Harbor Lines—Rights of Wharf Owner.*

Where a riparian owner has no interest in tide land, but simply in a wharf upon the land, including the land under the wharf within the harbor lines authorized by the state is not such a taking or damaging of the wharf as will entitle the owner to compensation, nor does such action cast a cloud upon his title. — *Id.*, 530.

See EMINENT DOMAIN, 1; INJUNCTION, 1.

## SALE.

1. *Action for Price—When Lies.*

Where defendant employs plaintiff to build him a boat for a certain price, the general property in the boat, when completed according to contract, is in the defendant, and he is liable for the contract price upon his refusal to take the boat. — *Moore v. Perrott*, 1.

2. *Warranty—Inspection of Goods.*

Where there was a warranty of the quality of brick ordered for the construction of coke ovens, and in an action for the purchase price of the brick the defendant sets up a breach of such warranty as a counter-claim, it is error to instruct the jury "that if the defendant, before using the same, had an opportunity to inspect said goods and did not do so, and if, upon such inspection, could have ascertained the defects claimed, then said defendant is not entitled to any damages." — *Tacoma Coal Co. v. Bradley*, 600.

3. *Action for Price—Defective Goods—Notice to Vendor.*

A vendee may retain goods after knowledge of their defects, without giving notice to the vendor thereof, and, in an action by the vendor for the purchase price, plead breach of warranty for the purpose of recouping damages. — *Id.*, 600.

4. *Same—Breach of Warranty—Burden of Proof.*

Where, in an action to recover the price of brick, the defendant alleges a warranty or its equivalent, and a breach thereof, the burden is on defendant to prove both the warranty and the breach. — *Id.*, 600.

5. *Same—Evidence—Instructions.*

Where defendant relies upon the falling in of the coke ovens as proof of the poor quality of the brick, it is not erroneous to instruct that "if the falling in of said ovens was caused by a misconstruction of the same, or any defects in said construction or material used therein, other than the goods involved in this controversy, or the misuse of said oven subsequent to said construction, the defendant is not entitled to any damages." — *Id.*, 600.

## SCHOOLS AND SCHOOL DISTRICTS.

1. *Extension of City Limits—Annexation of Districts—Terms of School Officers.*

Under the Laws 1889-90, p. 386, §§ 1 and 2, cities of more than ten thousand inhabitants can, by an extension of their city limits, embrace other and independent school districts, and by such exten-

## SCHOOLS AND SCHOOL DISTRICTS (Continued).

sion prematurely end the official terms of the school officers of the districts or parts of districts so brought into the extended city limits. — *McGovern v. Fairchild*, 479.

2. *Same — Enlarged District — To What Board Subject.*

In such cases, upon the annexation of additional territory, it all becomes merged in the school district comprising the city, and, the officers of the district so annexed at once ceasing to hold office, the enlarged district becomes subject to the control of the board of education of said city as constituted before such enlargement. — *Id.*, 479.

SEAL. See EVIDENCE, 5.

## SPECIFIC PERFORMANCE.

1. *Contract of Decedent — Notice of Proceeding.*

In a proceeding, under chapter 52, Code 1881, to enforce the specific performance of a contract to convey real estate made by a decedent, a notice by publication to the administrator of the estate, "and all persons having an interest in said estate," is sufficient without being directed to "all persons interested as creditors, heirs, devisees or personal representatives" thereof. — *Sander-Roman Co. v. Yesler's Estate*, 429.

2. *Same — Loss of Jurisdiction — Re-opening Case.*

In such a proceeding, where the administrator was not served with copies of the petition and notice, and there was no adjournment of the hearing, the court was without jurisdiction at a later date to entertain the petition, or to re-open the case to allow a party served by publication only to appear and defend. — *Id.*, 429.

3. *Same — Decree for Deed — Time of Execution.*

A decree in such a proceeding ordering the administrator to execute a deed forthwith, and, in default thereof within ten days, decreeing that a commissioner shall execute same, is erroneous, as, under § 630, Code 1881, a conveyance is not to be made until after the time for an appeal shall have elapsed. — *Id.*, 429.

4. *Contract to Convey — Evidence — Sufficiency.*

In an action for specific performance, where the evidence shows that plaintiff entered into possession of land and improved same under a contract for its purchase from defendant for the price of \$350, one-third to be paid at the time the deed passed, and the balance in a reasonable time; and that plaintiff made payments amounting to the sum of \$80, and subsequently tendered the balance of \$350, with interest, and demanded a deed, which defendant refused on the ground that "he did not pay it when he agreed to a year before," a decree in favor of plaintiff should be sustained. — *Janson v. Peterson*, 447.

5. *Pleading — Contract to Convey — Mutual Mistake.*

A complaint for specific performance of a contract to convey certain land which sets out a written memorandum thereof, indefinite and defective in the elements necessary to a perfect contract, and alleges that by mutual mistake of the parties thereto the contract agreed to and which was intended to have been embodied in said writing, provided for the sale of "one acre, to be taken in a square form out of the northwest corner" of a certain lot, for which the buyer was to pay "one dollar in cash at this date, and ninety-nine dollars nine months from date," is sufficient on demurrer. — *Vail v. Tillman*, 476.

See LANDLORD AND TENANT, 3.

## STATEMENT OF FACTS.

*Settlement—Signing and Certifying—Duty of Trial Judge.*

It is the duty of the judge who tries a case, when required, "to settle between the parties what is the proper statement, and to certify the same;" and it is not a sufficient excuse for not settling and certifying a statement of facts, to say that the transcript of the evidence is held by a stenographer for the purpose of securing his fees, when such transcript has already been filed in the cause and subsequently withdrawn from the files with the judge's permission. — *State ex rel. Quade v. Allyn*, 470.

See APPEAL AND ERROR, 4, 7, 17, 18, 19; CRIMINAL LAW, 3.

## STATES AND STATE OFFICERS.

1. *Mining Bureau—Powers—Geological Survey.*

The act creating a mining bureau and defining its powers (Laws 1889-90, p. 249) does not authorize the mining bureau either to direct or superintend a geological or mineralogical survey of the state, nor to disburse moneys appropriated for such purpose. — *Parrish v. Reed*, 491.

2. *Same.*

The act of March 7, 1891, appropriating moneys "for making a geological and mineralogical survey of the state," does not expressly nor impliedly enlarge or define the powers and duties of the mining bureau, and make it the agency whereby the same is to be expended. — *Id.*, 491.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

## STATUTES.

1. *Title of Act—Declaration of Subject—Sufficiency.*

The act approved February 2, 1888, entitled "An act to regulate, restrain or prohibit the sale of intoxicating liquors," does not contravene the provision of the organic act of the territory (Rev. St. U. S., § 1924), requiring an act to embrace but one subject, which shall be expressed in the title. — *State v. Spokane Falls*, 40.

2. *Repeal of Special Laws by Implication.*

The intention of the legislature in enacting laws should be ascertained; and, if it sufficiently appears that it was intended that a subsequent general law should supersede all prior legislation upon the same subject, general or special, though not expressly so stated, effect should be given to such purpose. — *Northern Pacific Railroad Company v. Haas*, 376.

See CONSTITUTIONAL LAW, 1, 4; EMINENT DOMAIN, 2; INTOXICATING LIQUORS, 1; MUNICIPAL CORPORATION, 10, 15, 16.

STENOGRAPHERS. See COSTS AND FEES, 1; STATEMENT OF FACTS.

TAXATION. See CONSTITUTIONAL LAW, 6; ESTOPPEL, 1; INTOXICATING LIQUORS, 1.

TIDE LANDS. See CONFLICT OF LAWS; ESTOPPEL, 3; INJUNCTION, 1; PUBLIC LANDS, 3, 4; RIPARIAN RIGHTS, 1, 6, 7.

TRESPASS. See EMINENT DOMAIN, 3.

## TRIAL.

1. *Instructions—On What Points Necessary—Negligence.*

Where the court has already instructed the jury that if it did not appear by a preponderance of the evidence that the injury was occasioned by defendant's negligence they should find for defendant, it is not error for the court to refuse to instruct that if the injury occurred by defects in the wall caused by the elements, which were not discovered by ordinary care, the plaintiff cannot recover in the absence of further negligence on the part of the defendant. — *Spokane Truck and Dray Co. v. Hoefer*, 45.

2. *Argument of Counsel—Errors Cured by Instruction of Court.*

Where statements transgressing the reasonable limits of argument to a jury are made under an apparent *bona fide* belief that they are permissible under the proof, and no objection is made thereto at the time, the party aggrieved must be content with an instruction to the jury to disregard such statements. — *Skagit Railway and Lumber Co. v. Cole*, 57.

3. *Instructions—Treble Damages—When Error not Cured by Verdict.*

An instruction that in a case where treble damages could be awarded under § 602, the jury could themselves assess the treble damages, is erroneous, as it is the province of the court, after the jury has assessed actual damages, to treble the damages in its judgment; nor can such erroneous instruction be regarded as harmless, where the jury awarded a certain amount as "single damages," as some of the jurors may have agreed to a large verdict for "single damages," if other jurors consented to waive their view that the damages should be treble. — *McLeod v. Ellis*, 117.

4. *Default by Principal Defendant—Right of Intervenor to Trial.*

Although the owner of the lumber and shingles may have made default, the holder of a chattel mortgage thereon, impleaded as defendant, who has answered denying all the plaintiffs' allegations, is entitled to a trial. — *Dexter Horton & Co. v. Sparkman*, 165.

5. *Instructions—Harmless Error.*

Although an instruction, standing alone, may be erroneous, yet it cannot be complained of, if the instructions, taken as a whole, fairly state the law applicable to the facts. — *Northern Pacific R. R. Co. v. Hess*, 383.

6. *Instructions—Weight of Evidence—Testimony.*

A charge to the jury that plaintiff must establish all his material allegations by a preponderance of the testimony is not erroneous, because the word "testimony" is used in place of "evidence," as it will not be presumed the jury were misled thereby. — *Noyes v. Pugin*, 653.

See APPEAL AND ERROR, 6; ATTACHMENT, 1; CONTINUANCE;  
CRIMINAL LAW, 2, 7, 8, 10, 11; INTOXICATING LIQUORS, 3;  
PLEADING, 1.

VARIANCE. See EVIDENCE, 7; PLEADING, 2; RAPE, 1.

## VENDOR AND VENDEE.

*Quantity of Land—Mistake—Rights of Parties.*

In an action upon a promissory note given in part payment for a tract of land represented by the plaintiff as containing  $36\frac{1}{2}$  acres when in fact it only contained  $26\frac{1}{2}$  acres, plaintiff can only recover for the balance of purchase price on  $26\frac{1}{2}$  acres, whether he knew the representation to be false, or whether there was a mutual mistake by both parties to the contract. — *Hanson v. Tompkins*, 508.

See LANDLORD AND TENANT, 8.

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**VENUE IN CIVIL CASES.**
**1. *Transitory Actions—Waiver of Objections.***

The provision of § 50, Code of 1881, permitting trial in the county where an action is commenced, although not the proper county, unless the defendant files an affidavit of merits and demands that the trial be had in the proper county, applies only to transitory actions, and not to such as are local in their nature, and consequently actions for injuries to real property must be tried in the county or district where the real property lies. — *McLeod v. Ellis*, 117.

**2. *District—Construction of Term.***

The term "district," as used in § 47 of the Code of 1881, refers only to districts composed of two or more counties joined for jurisdictional purposes, where sessions of court are held in but one of the counties. — *Id.*, 117.

**3. *Conversion of Trees—Venue Upheld by Treating Complaint as an Action for Tort.***

In an action for the wrongful conversion of trees, which was not commenced nor tried in the county where the land was situated, a paragraph of the complaint, based upon § 602 of the code, relating to trespass upon land, and claiming treble damages thereunder, may be rejected as surplusage, and the action treated as merely one of conversion, for the purpose of sustaining the jurisdiction of the court. — *Id.*, 117.

**VENUE IN CRIMINAL CASES. See CRIMINAL LAW, 5.**

**VERDICT.** See APPEAL AND ERROR, 25; CRIMINAL LAW, 3; EVIDENCE, 1; JUDGMENT, 8; REPLEVIN, 1; TRIAL, 3.

**VERIFICATION.** See LOGS AND LOGGING, 5.

**VESTED RIGHTS.** See PUBLIC LANDS, 7, 8; RIPARIAN RIGHTS, 7.

**WAIVER.** See LANDLORD AND TENANT, 1, 2; PLEADING, 3; VENUE IN CIVIL ACTIONS, 1.

**WARRANTY.** See SALE, 2, 3, 4.

**WASTE.** See REPLEVIN, 2, 3.

**WHARVES.** See EMINENT DOMAIN, 1; RIPARIAN RIGHTS, 2, 3, 4, 8.

**WITNESS.**
**1. *Failure to Testify on Second Trial—Contradiction of Testimony in Former Trial.***

Where, in the cross-examination of a witness, the defendant brings out the fact that the brother had stated he was to get money from an old school-mate, it is not error for the plaintiff to show, on the failure of the brother to testify at the second trial of the cause without any excuse shown therefor, that on a former trial the brother had stated he received money with which to purchase the note and mortgage from a certain person who was understood by the parties at the trial to be the old school-mate referred to, and then introduce the latter's deposition to contradict him. — *McGraw v. Franklin*, 17.

## WITNESS (Continued).

2. *Competency—Transactions with Decedents.*

Where the equitable title to real estate has been decreed in the mother of a decedent, as executrix of her husband's estate, she having supplied decedent with funds of the estate with which to purchase the realty, in an action of ejectment afterward brought by the executrix against one in possession thereof under an alleged oral agreement with decedent, the evidence of defendant is inadmissible in his own behalf, either under § 389, Code 1881, or the amendment thereof in Laws 1889-90, p. 91.—*Smith v. Taylor*, 422.

8. *Refreshing Memory—Copy of Document.*

A party testifying as a witness cannot refresh his memory of the number of shares of stock sold by referring to a written list copied by him from an extract of the record made by an under clerk of the building association; nor is the admission of the president of the association, to whom the original had been shown, that "it was correct in the total," competent evidence, when the paper shows no total.—*American Bldg., etc., Assn. v. Hart*, 594.

See CRIMINAL LAW, 6.

## WORDS AND PHRASES.

"District," see VENUE IN CIVIL CASES, 2.

"Testimony," see TRIAL, 6.

"West," see BOUNDARIES, 1.

WRIT AND PROCESS. See JUDGMENT, 9; SPECIFIC PERFORMANCE, 1.

*Ex. 5, 22, 22,*

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